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I hereby declare that I have read and understood the regulations governing the submission of Masters of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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CHAPTER 1

INTRODUCTION

The imposition of mandatory minimum sentences is a controversial subject in Canada, as it has been, and often continues to be, in many other jurisdictions. In an effort to strengthen criminal law, the government recently enacted the *Safe Streets and Communities Act*,¹ thereby reviving the debate on mandatory sentences. In particular, the Act introduced new minima for crimes involving drugs² and sexual offences against children.³

The choice of this sentencing regime arouses the opposition of many scholars.⁴ In addition to conflicting with some of the sentencing principles promulgated in the *Criminal Code*,⁵ it is a clear violation of the traditional judicial discretion in the Canadian sentencing process. Similar opposition was expressed when *Act 105 of 1997*⁶ was introduced in South Africa, another state with a history of judicial discretion during sentencing. Despite marked differences between the two societies, South Africa provides an interesting comparative example which raises questions about the wisdom of the Canadian government's new legislation.

To analyse this matter, this paper first paints a portrait of mandatory penalties in Canada. After looking at the legislative history of prescribed minima and the government's decision to halt the sentencing commission, we examine how these sentences interact with the statutory principles of sentencing enacted in 1996.⁷

In the following chapter, we consider different scholars' arguments against mandatory minima due to various difficulties that these minima can create: they generally provoke the inflation of sentence severity; they conflict with the principle of proportionality by imposing categorical judgments as to the seriousness of crimes;

¹ An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts – hereafter the *Safe Streets and Communities Act*, S.C. 2012, c. 1

² Part 2, Sections 39 to 46 *Safe and Streets Communities Act*, S.C. 2012, c.1

³ Part 2, Sections 10 to 38 *Safe Streets and Communities Act*, S.C. 2012, c. 1

⁴ Such as Anthony N. Doob, Stephan S. Terblanche and Julian V. Roberts

⁵ *Criminal Code*, R.S.C. 1985, c. C-46

⁶ *Criminal Law Amendment Act 105 of 1997*

⁷ Section 718 – 718.2 *Criminal Code*, R.S.C. 1985, c. C-46

they hinder the proper functioning of the judicial system; and they can create injustices.

Chapter 4 presents the legislation recently enacted by the Canadian government, which re-introduces mandatory minima for certain offenses. We consider the socio-political background of the *Safe Streets and Communities Act*⁸ and the opposition against its introduction.

The paper's discussion then focuses on the South African experience. Chapter 5 presents the sentencing framework in South Africa: we consider the guidelines applied by courts in the sentencing process, examine the principle of judicial discretion cherished by judges and finally study the case of *Makwanyane*⁹ and its backlash.

Chapter 6 offers a closer look at *Act 105 of 1997*¹⁰ and the introduction of a 'substantial and compelling circumstances' clause¹¹ for the imposition of mandatory penalties. We see that the Act generated great judicial dissatisfaction, and that the Supreme Court of Appeal was required to provide guidance as to the application of the exemption clause. Despite the teachings of the Court, the application of this clause remains vague and we explore the interpretation that courts have given it.

Finally, the last chapter offers a broad regard on both jurisdictions concerning the imposition of mandatory penalties, and proposes some lessons to be learned. After considering the pitfalls of such sentences in South Africa and the inconsistencies generated by the exemption clause, we examine the similarities and divergences of both societies. We take into account judicial legacy, legal cultures, socio-political values and political influence in the two jurisdictions, and try to understand whether these create a need for harsher sentences, which is the ultimate consequence of mandatory minima. We lastly acknowledge the common arguments put forward in both judicial systems to justify the imposition of mandatory penalties: the fact that they reduce disparity in sentencing, improve efficiency and effectiveness. Based on academics' findings, we envisage other means to achieve the same goals.

Looking back over the last 15 years since the imposition of mandatory minima in South Africa, what lessons can be learnt? This study will suggest that the Canadian

⁸ Safe and Streets Communities Act, S.C. 2012, c.1

⁹ *S v Makwanyane* 195 (2) SACR 1 (CC)

¹⁰ Criminal Law Amendment Act 105 of 1997

¹¹ Section 51[3](a) Criminal Law Amendment Act 105 of 1997

government is unlikely to achieve its goals and to improve the Canadian criminal justice system by reintroducing statutory minimum sentences.

CHAPTER 2

MANDATORY PENALTIES IN CANADA

2.1 Legislative history of mandatory minimum sentencing in Canada

The first Criminal Code of Canada¹² was enacted in 1892 and originally included only six offences which carried a minimum term of imprisonment. These offences were: engaging in a prize fight (three months), defrauding the government (one month), stealing mail bags (three years), stealing mail (three years), stopping the mail with intent to rob (five years), and corruption in municipal affairs (one month). The majority of these first mandatory minima were intended to enforce the legitimacy of public institutions.¹³

Indeed, the legislative history of mandatory minimum sentencing in Canada reveals a strong attraction among politicians to these types of penalties, despite the conclusions of various commissions through the years.¹⁴ Looking back at Canadian Senate hearings from 1952, it appears that politicians then had as much of a taste for mandatory minima as politicians today.¹⁵ When he appeared before the Senate in 1952, the Minister of Justice announced:

‘While there may be some merit in the recommendation of the Commission [which was reviewing the Criminal Code], we think that because of their deterrent effect, minimum penalties should not be entirely abolished, and it is for this reason that we propose they should be retained in respect of the offences I have just mentioned.’¹⁶

This statement would not have seemed out of place in 1995, when the government imposed a new set of mandatory minima in its firearms-related legislation,¹⁷ or last year, when the government introduced the *Safe Streets and Communities Act*.¹⁸

¹² Criminal Code of Canada, 1892, c.29

¹³ N Crutcher ‘The legislative history of Mandatory Minimum Penalties of Imprisonment in Canada’ (2001) 39 *Osgoode Hall L.J.* 273-285

¹⁴ See more details on Canadian Sentencing Commissions and their recommendations further on in this section.

¹⁵ A Doob & C Cesaroni ‘The political attractiveness of mandatory minimum sentences’ (2001) 39 *Osgoode Hall L.J.* 287

¹⁶ *Senate Official Report of Debates* (1952) 210 in Doob & Cesaroni op cit (n15) 289

¹⁷ Firearms Act, S.C. 1995, c. 39

¹⁸ Safe Streets and Communities Act, S.C. 2012, c. 1

The offences referred to in 1952 included driving while intoxicated or while ability-impaired, thefts of certain items from the post office, robbery of the mail, and theft of a motor car.¹⁹ Over the last few years in the Canadian Parliament, private members' bills²⁰ have been introduced to add new minimum sentences. There appears to be very little tolerance for repeat offenders and offences where a firearm is used.²¹ Consequently, approximately 40 offences in the Canadian *Criminal Code*²² carry a mandatory minimum prison sentence, 19 of which concern offences committed with the use of a firearm. These sentences were introduced as part of Bill C-68,²³ a package of firearms-related legislation in 1995.

Deterrence was the main argument put forward by politicians to justify the introduction of this Bill and the many prescribed minimum sentences. In his first appearance before the House of Commons Committee on Justice and Legal Affairs,²⁴ Minister of Justice Rock Allan cited deterrence no fewer than nine times, and made no reference to any other sentencing purpose.²⁵

As Roberts points out, it is curious that deterrence seemed so pressing an objective, as the number of firearms offences had been declining steadily prior to the creation of the firearms mandatory minima.²⁶ This underlines the fact that in Canada, as in many other jurisdictions, the political agenda has an important influence over determining the sentencing regime.

Many alternatives were proposed before the adoption of Bill C-68 and the introduction of its new mandatory minimum sentences in the Criminal Code. For instance, one suggestion was that the government should make the use of a firearm an aggravating

¹⁹ Doob & Cesaroni op cit (n15) 289

²⁰ A private member's bill is a proposed law presented to the House of Commons by an individual member of parliament (MP) who is not a cabinet minister. The MP who introduces a legislative motion can be a member of a party represented in the government or in the opposition.

²¹ Doob & Cesaroni op cit (n15) 289

²² Criminal Code, R.S.C. 1985, c. C-46

²³ Bill C-68, An Act respecting firearms and other weapons, 1st session, 35th Parl., 1995, cl.19. Bill C-68 introduced 10 mandatory minimum sentences, each carrying four-year minimum sentences, imposed on convicted offenders whose crimes were committed with a firearm. The Bill also created 8 minimum prison sentences for second-time convicted offenders, varying from 6 months to 2 years. See Criminal Code, R.C.S. 1985, c. C-46

²⁴ Regarding the Committee that was reviewing Bill C-68, see JV Roberts 'Mandatory Minimum Sentences of Imprisonment: Exploring the consequences for the sentencing process' (2001) 39 *Osgood Hall L.J.* 314

²⁵ See Testimony by the Minister of Justice, 24 April 1995 in Roberts op cit (n24) 314

²⁶ For example, the number of robberies with a firearm declined by 39 per cent (from 8995 to 6646 incidents) over the period from 1991 to 1997 (UCR data table), according to Roberts op cit (n24) 314

factor in the gravity of the offence or that the government should opt for stricter firearm control.²⁷ The option of mandatory minimum sentences had also been considered previously. Under this version, different bands of mandatory minima would have been assigned. Each offence would therefore have been on a scale with the different bands reflecting their relative seriousness, as reflected in existing sentencing practice.²⁸ This last proposal would have been a more meaningful way to reconcile these sentences with the codified principle of proportionality.

Parliament decided instead to introduce a drastic four-year minimum sentence for ten new offences. It justified the severity of these sentences²⁹ on the basis that harsher sentences would reduce the number of crimes committed with firearms. According to the government, potential offenders would henceforth be more deterred by the prospect of a minimum sentence of four years' imprisonment.³⁰ However, before the introduction of the Bill, the government had had access to a study which found that minimum sentences were not a particularly good method of crime prevention.³¹ The study concluded that if the imposition of minimum sentences had any influence at all on crime rate reduction, the impact would be minimal. Moreover, the government had access to many other studies on the subject,³² all of which indicated the lack of any significant correlation between harsher sentences and crime reduction.

Despite this research, a wave of mandatory sentences came into force in 1995. In bringing in these penalties, Parliament showed very little concern about the nature of the mandatory sentences in relation to the fundamental principle of sentencing. It demonstrated that Parliament 'simply wanted to make a punitive statement about the criminal use of a firearm.'³³ In reality, this choice was an ineffective means of 'trying to better control violent crime.'³⁴

²⁷ H Dumont *Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction* in 'Mandatory Minimum Sentences: Law and Policy' (2001) 39 *Osgoode Hall L.J.* 339

²⁸ Roberts op cit (n24) 319

²⁹ Dumont op cit (n27) 336

³⁰ Dumont op cit (n27) 338

³¹ C Meredith, B Steinke & S Palmer 'Research on the Application of the Criminal Code Section 85' (1994) in Dumont op cit (n27) 348

³² D Cousineau 'Sanctions Légales et Dissuasion' Canadian Sentencing Commission (1988); A Blumstein, J Cohen & D Nagin (eds.) 'Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates' (1978) 95-159; WM Evan 'Social Structure and Law: Theoretical and Empirical Perspectives' (1990) 72-73 in Dumont op cit (n27) 348

³³ Roberts op cit (n24) 319

³⁴ Dumont op cit (n27) 339

Analysing research conducted in the mid-1990s, Tonry suggested that:

‘[...] most elected officials who support such laws are only secondarily interested in their effects; officials’ primary interests are rhetorical and symbolic. Calling and voting for mandatory penalties, as many state and federal officials repeatedly have done in recent years, is demonstration that officials are “tough on crime”. If the law “works”, all the better, but that is hardly crucial. In a time of heightened public anxiety about crime and social unrest, being on the right side of the crime issue is much more important politically than making sound and sensible public policy choices.’³⁵

As the federal political system of Canada consists of a parliamentary system formed of several parties, one might have imagined that the centre and left wing parties would have fought against the introduction of ‘tough on crime’ policies and the adoption of harsher sentences, such as mandatory minima. These parties have suggested that they understand what a limited role the criminal justice system can play in reducing crime.³⁶ However, the dominant right-wing party held the majority between 1984 and 1993,³⁷ resulting in the adoption of gun control legislation that carries mandatory minima and an increase of about 25 per cent in the number of people in prison.³⁸

Between 1993 and 2006, the Liberal party (centre-left wing) was elected the majority party for two terms in a row and, despite the introduction of private members’ bills in Parliament, no amendments were made to the Criminal Code that would have added, repealed or modified the statutory minimum sentences. Since the re-election of the Conservative party in 2006, mandatory penalties have been reintroduced onto the policy agenda, as will be discussed below.

³⁵ M Tonry ‘Mandatory Penalties’ in *Crime and Justice: A review of Research*, M. Tonry, ed. 16 (1992) 244

³⁶ AN Doob ‘The new role of parliament in Canadian sentencing’ (March/April 1997) 9 *Federal Sentencing Reporter* 239

³⁷ Canadian political parties in power since 1968: Liberal (Trudeau) 1968-1979, Progressive Conservative (Clark) 1979-1980, Liberal (Trudeau) 1980-1984, Liberal (Turner) 1984, Progressive Conservative (Mulroney) 1984-1993, Progressive Conservative (Campbell) 1993, Liberal (Chrétien) 1993-2003, Liberal (Martin) 2003-2006, Conservative (Harper) 2006 – present. See <http://www.parl.gc.ca/Parlinfo/Compilations/FederalGovernment/MinistriesDuration.aspx>

³⁸ This increase is shown for the period between 1986-1987 and 1995- 996; see AN Doob op cit (n36) 239

2.2 The current situation regarding mandatory minima in Canada

Currently, minimum sentences in Canada can be broken down into four principal categories. The first type is a mandatory life sentence imposed upon conviction for only three offences: treason, first degree and second degree murder.³⁹ The second type consists mainly of firearms offences.⁴⁰ Since the enactment of Bill C-68, it is the largest category and today encompasses 16 offences. The third type of mandatory minimum sentences relates to repeat offenders. It applies only to an offender with at least one previous conviction for the same offence. The seven offences in this category relate to impaired driving, betting and possession of unauthorised weapons.⁴¹ Finally, the fourth type of minimum sentence concerns hybrid offences. For these offences, Crown prosecutors have the option of electing to proceed by way of summary offences, for which punishment does not usually carry a mandatory minimum sentence, or by way of indictment, where a conviction will result in the imposition of a minimum sentence.⁴²

2.3 The Canadian Sentencing Commission

In 1984, a sentencing reform process was initiated with the creation of the Canadian Sentencing Commission. This was the first Commission of Inquiry in the nation's history devoted exclusively to sentencing,⁴³ established 'in recognition that serious problems exist in the structure of sentencing and that these problems could only be resolved by a comprehensive set of recommendations, which reflect the complexities of the criminal justice system as a whole'.⁴⁴ In February 1987, the Canadian Sentencing Commission issued a complete report that contained integrated and sophisticated reforms founded upon a 'just deserts' sentencing philosophy which would allow judges some latitude in pursuit of utilitarian sentencing goals.⁴⁵

³⁹ Section 47(1) & (4), Section 235(1) & (2) Criminal Code, R.S.C. 1985, c. C-46

⁴⁰ Section 85(3) Criminal Code, R.S.C. 1985, c. C-46

⁴¹ Section 255, Section 202(2), Section 92(3) Criminal Code, R.S.C. 1985, c. C-46

⁴² For example, see Section 271 (Sexual assault) or Section 380(1) & (1.1) (Fraud), Criminal Code, R.S.C. 1985, c. C-46

⁴³ JV Roberts 'Sentencing Reform: The Canadian Approach' (March/April 1997) 9 *Federal Sentencing Reporter* 245

⁴⁴ Canadian Sentencing Commission 'Sentencing Reform: A Canadian approach' (1987) 2

⁴⁵ Roberts op cit (n43) 245

Moreover, the report included a chapter on Mandatory Minimum Penalties that outlined issues around their imposition.⁴⁶ The Commission's recommendation on this matter was quite strict: it recommended that mandatory minimum sentences should be abolished for all offences except murder and high treason.⁴⁷ In its reasoning, the Commission noted that, since 1952, 'all Canadian commissions that have addressed the role of mandatory minimum penalties have recommended that they be abolished'.⁴⁸

The Commission's reform package received a generally favourable reaction from academics, criminal justice professionals and even some trial court judges. However, the federal government, which is ultimately responsible for criminal law reform, rejected it.⁴⁹

The Commission was abolished as part of a series of government financial cuts. In its absence, mandatory minimum penalties have continued to be enforced by the government. This is unfortunate as the country would benefit from the establishment of a Sentencing Commission that would assess sentencing changes over time. Such an institution could, for example, assess any changes in the incidence of crimes for which mandatory minimums are imposed. The creation of a permanent Sentencing Commission would enable the development of more coherent policy regarding sentencing.

In this respect, the Canadian Sentencing Commission listed a number of critical functions that the commission could perform in relation to mandatory minimum sentences.⁵⁰ First, it could provide the federal Department of Justice and Parliament with an *objective* examination of the results of research into the effectiveness (or disadvantages) of mandatory sentencing in general. Secondly, it would allow Parliament to know how its mandatory minimum sentence legislation was being implemented. Thirdly, the commission could provide models for ways in which to structure the creation of new mandatory minima, such as the ones that were introduced in the newly enacted *Safe Streets and Communities Act*.⁵¹ Finally, the most important

⁴⁶ See Chapter 3.3 of the Report

⁴⁷ A Doob 'Projet Muse: The Unfinished Work of the Canadian Sentencing Commission' (2011) 53 *CJCCJ* 282

⁴⁸ Doob & Cesaroni op cit (n15) 289

⁴⁹ Roberts op cit (n43) 245

⁵⁰ Roberts op cit (n24) 328-329

⁵¹ Safe and Streets Communities Act, S.C. 2012, c.1

contribution that could be made by a permanent sentencing commission would be to remind Parliamentarians if and when legislative proposals come into conflict with the statutory framework for sentencing established by Parliament itself in 1996.⁵² The latest is a major issue in the Canadian sentencing context for which the Courts have not yet found an effective and comprehensive remedy.

Due to the absence of a permanent sentencing commission, the Canadian legislative history of mandatory minimum sentencing has been inconsistent, led by a political agenda. While, for financial reasons, the government chose to abolish a sentencing commission that had proven efficient, the same government does not hesitate to promote the imposition of mandatory minima, which appear to be very costly for society. The government is clearly imposing its agenda onto the sentencing regime to further its own political goals. This is even more morally questionable considering that some of these minima are imposed in violation of several elements of the statement of the statutory purpose and principles of sentencing, which will now be discussed in detail.

2.4 Mandatory minimum penalties and the statutory principles of sentencing

In 1996, based on the reforms introduced by Bill C-41,⁵³ Parliament amended the *Criminal Code* to codify the purposes and principles of sentencing.⁵⁴ For Parliament to be consistent and coherent with the implementation of its legislation, one would assume that mandatory minima are constructed with a clear consideration of their relationship to the codified principles of sentencing. However, this assumption seems unfounded and such penalties often interfere with the sentencing principles. Since the codification of sentencing purposes and principles, Parliament has enacted many *ad hoc* pieces of exceptional legislation contrary to the general sentencing principles implemented in Part XXIII of the *Criminal Code*.⁵⁵ So, on the one hand, Canadian judges have at their disposal the purposes and principles of sentencing that were conscientiously codified in 1996 and, on the other, mandatory minima that cannot be

⁵² Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

⁵³ An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence Thereof, S.C. 1995, c.22 (Bill C-41)

⁵⁴ Section 718.1 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

⁵⁵ Dumont op cit (n27) 342

justified by those principles, and are therefore described by some as simply an attempt by Parliament to denounce and deter.⁵⁶

The adoption of *ad hoc* mandatory minima for various categories of offences can be seen as a major affront to two of the principles that were enacted in 1996. First, the principle of restraint, expressed in s718.2(d): ‘an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances’, and s718.2(e): ‘all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders’. Secondly, it also transgresses the principle of proportionality, which was designated as the fundamental principle of sentencing by s718.1: ‘a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender’.

The imposition of mandatory minima can therefore be challenged constitutionally on the basis that it infringes one of these fundamental rights of an accused, and indeed it has been in the case of *Smith*,⁵⁷ the Supreme Court’s first decision on the constitutionality of mandatory sentences. The Court found that a mandatory sentence of seven years’ imprisonment for importing narcotics constituted a violation of s12 of the *Canadian Charter of Rights and Freedoms*,⁵⁸ which contains a prohibition against cruel and unusual punishment. When considering a violation of the rights of the accused under the Charter, the Court must proceed by a two-step analysis. First, the Court must decide whether there was a violation of one of the provisions of the Charter. If it reaches that conclusion, the Court must then consider whether this violation could be justified under s1 of the Charter.⁵⁹

Writing for the Court in *Smith*,⁶⁰ Mr Justice Lamer mentioned that courts should show deference to Parliament and warned the courts not to ‘stigmatise every disproportionate or excessive sentence’ as unconstitutional, but only those that were grossly disproportionate and ‘so excessive as to outrage standards of decency’.⁶¹

⁵⁶ Roberts op cit (n24) 314

⁵⁷ *R v Smith* 1987 1 S.C.R. 1045

⁵⁸ The Constitution Act of 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, part 1

⁵⁹ Section 1: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

⁶⁰ *R v Smith* supra (n57)

⁶¹ *R v Smith* supra (n57) at 1072. While Justice Wilson, Justice LeDain and Justice La Forrester agreed that the minimum sentence was unconstitutional (Justice McIntyre dissenting), Chief Justice Dickson

Having concluded that the mandatory minimum sentence of seven years' imprisonment prescribed in s5(1) of the *Narcotic Control Act*⁶² (without regard to the type or quantity of the substance involved) would constitute a cruel and unusual punishment, Mr. Justice Lamer held that the s12 violation had not been justified under s1 of the Charter. Although the mandatory sentence was rationally connected to the important objective of deterring the import of drugs, there was 'no need to be indiscriminate'.⁶³ Parliament could have tailored the mandatory penalty so that it did not apply to small-time offenders.

Until recently, the violation of the prohibition against cruel and unusual punishment was the basis on which the imposition of a mandatory minimum sentence could be challenged. Yet in a recent decision,⁶⁴ the Supreme Court considered the reduction of a sentence below a statutory mandatory minimum as appropriate reparation in a case of state misconduct under s24(1) of the Charter.⁶⁵ Even though the Court recognised the possibility of challenging mandatory sentences under s24(1), it held that sentencing judges had no right to override a clear statement of legislative intent and reduce a sentence below a statutory mandated minimum in the absence of exceptional circumstances. Such derogation might be appropriate only for some 'particularly egregious'⁶⁶ forms of state misconduct, but in usual cases the mandatory minimum sentence set out by Parliament must be applied.

The Supreme Court of Canada sets a very high test for courts to depart from a prescribed minimum sentence, in the context of a violation under s24(1) of the Charter. The 'grossly disproportionate and excessive' criteria developed in *Smith*,⁶⁷ which would amount to a violation of the prohibition against cruel and unusual punishment, are mirrored by any 'particularly egregious' form of misconduct that would merit reparation for violation of a right guaranteed by the Charter in *Nasogaluak*.⁶⁸ Despite this new constitutional challenge, the Supreme Court of

was the only member of the panel to join Justice Lamer's reasoning.

⁶² Narcotic Control Act, R. S. C., 1985, c. N-1 [repealed 1996, c. 19, s.94]

⁶³ K Roach 'The Constitutionality of Mandatory Sentences' (2001) 39 *Osgoode Hall L. J.* 371

⁶⁴ *R v Nasogaluak* 2010 1 S.C.R. 206

⁶⁵ Section 24(1): Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

⁶⁶ *R v Nasogaluak* supra (n64) at 64

⁶⁷ *R v Smith* supra (n57) at 1072

⁶⁸ *R v Nasogaluak* supra (n64)

Canada has maintained its position: statutory mandatory minima are constitutional and must be applied, unless exceptional circumstances are demonstrated.

Since its decision in *Smith*,⁶⁹ the Court has upheld every mandatory minimum sentence that has been challenged under s12 of the Charter. Roach suggests that this change in the Supreme Court approach towards mandatory sentences and the impact that it might have in the future is not only due to the ‘twists and turns that can be detected in the doctrine, but also [to] deeper and more fundamental shifts in both constitutional law and sentencing’.⁷⁰ His analysis is based on the evolving jurisprudence that has challenged mandatory sentences under s12 of the Charter. These sentences include mandatory life imprisonment and ineligibility for parole for 25 years for first degree murder;⁷¹ mandatory life imprisonment and ineligibility for parole for at least ten years for second degree murder;⁷² a seven-day mandatory minimum sentence for driving with a suspended driving licence;⁷³ and a four-year mandatory minimum sentence for criminal negligence causing death by a firearm.⁷⁴

Roach examines these decisions in light of the Court’s changing approach to Charter review and suggests the four following statements. First, Roach points out that the Canadian sentencing scene has experienced significant changes in recent years. Parliament has codified the principles and purposes of sentencing,⁷⁵ and has declared that the proportionality of the sentence to the gravity of the offence and the degree of responsibility of the offender as fundamental principles of sentencing. It has also increased the number of mandatory sentences in an attempt to deter and denounce a broad range of crimes.⁷⁶

The Court, for its part, has recognised denunciation and retribution as legitimate purposes of sentencing and has drawn a dichotomy between punitive purposes, which focus on punishing the offender and deterring others, and restorative purposes, which focus on rehabilitating the offender and responding to the needs of the offender, the victim and the community. In doing so, the Court has departed from a strict ‘due

⁶⁹ *R v Smith* supra (n57)

⁷⁰ Roach op cit (n63) 369

⁷¹ *R v Luxton* 1990 2 S.C.R. 711

⁷² *R v Latimer* 2001 1 S.C.R. 3

⁷³ *R v Goltz* 1991 3 S.C.R. 485

⁷⁴ *R v Morrissey* 2000 2 S.C.R. 90

⁷⁵ Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

⁷⁶ Those crimes are mainly related to crimes involving firearms and child prostitution – See Roach op cit (n63) 369

process' approach to protecting the constitutional rights of the accused and, instead, has balanced competing rights and interests in criminal justice, often deferring to Parliament's attempt to protect the victims and potential victims of crime. This dichotomy drawn by the Supreme Court of Canada suggests that it shares a rather populist opinion of human motivation. In fact, the Court 'appears to be arguing that a careless hunter or careless gun owner would shrug off a gun accident that would take the life of a friend or fellow hunter unless there was a mandatory minimum sentence.'⁷⁷

Accordingly, the Court has become more restrained about applying the Charter to potentially ill-defined laws and more deferential to Parliament's decision to enact mandatory penalties that stress some purposes of punishment over others. For example, the Court built on the acceptance of denunciation and retribution in *R v M(C.A.)*⁷⁸ and Parliament's proclamation of proportionality as the fundamental principle of sentencing, to uphold mandatory sentences in *Morrisey*⁷⁹ and *Latimer*.⁸⁰

'The objective of denunciation mandates that a sentence should communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. [Emphasis in original.]'⁸¹

The restrained intervention of the Court in application of the Charter and its acquiescence to Parliament's principles has led the Court to uphold every mandatory minimum sentence that has been constitutionally challenged since *Smith*.⁸²

Furthermore, the Court has shown an increased acceptance of the retributive 'just deserts' principle. In theory, this principle should not result in harsher sentencing and, when properly applied, does not constitute an argument in favour of mandatory sentencing. In fact, the primary basis of the contemporary desert theory⁸³ for deciding the quantum of punishments is the principle of proportionality or 'commensurate deserts', requiring the severity of the penalty to be proportionate to the gravity of the

⁷⁷ Doob & Cesaroni op cit (n15) 291

⁷⁸ *R v M (C.A.)* 1996 1 S.C.R. 500

⁷⁹ *R v Morrisey* supra (n74)

⁸⁰ *R v Latimer* supra (n72)

⁸¹ *R v M (C.A.)* supra (n78) at 81

⁸² *R v Smith* supra (n57)

⁸³ A von Hirsch 'Proportionate Sentences: A Desert Perspective' in A von Hirsch, A Ashworth and J Roberts *Principled Sentencing – Readings on Theory and Policy* 3ed (2009) 118

defendant's criminal conduct. The criterion for deciding the quantum of punishment is thus 'retrospective rather than consequentialist': the seriousness of the offence for which the defendant stands convicted.⁸⁴

The issue in this instance is that the Court has become more prepared to focus objectively on the gravity of the offence and the offender's responsibility for the offence (requiring proof of fault), even in the case of non-intentional crimes that result in serious harm. The cases of *Morrissey*⁸⁵ and *Latimer*⁸⁶ illustrate the narrow approach favoured by the Court, which considers the moral responsibility of offenders and the circumstances of offences by focusing on the *mens rea* of the crime committed as a primary justification for the imposition of mandatory sentences. This approach is not far removed from a purely retributivist policy⁸⁷ which focuses on the consequences of the crime committed, rather than a 'just desert' principle which would encompass a comprehensive theory of criminal justice⁸⁸ by also taking into account considerations such as the need to deter and to rehabilitate offenders in the light of their individual characteristics.

The decision as to whether to retain mandatory sentences currently appears to be almost exclusively in the hands of Parliament. Effectively, the Court seems to be increasingly attracted to constitutional minimalism and passive virtues involved in deciding one case at a time. But attempting to prove a case-specific exemption is a very high burden for the accused, as he or she would have to prove that the mandatory sentence reaches the qualification of a cruel and unusual punishment, a burden much higher than the demonstration of exceptional circumstances.

As H  l  ne Dumont points out in her article about mandatory minimum sentences in the context of firearms legislation,⁸⁹ constitutional minimalism and the passive virtues that the Supreme Court now favours lead to the withdrawal of judicial authority for the benefit of executive power:

⁸⁴ Ibid

⁸⁵ *R v Morrissey* supra (n74)

⁸⁶ *R v Latimer* supra (n72)

⁸⁷ J Braithwaite & P Petit 'Not Just Deserts: A Republican Theory of Criminal Justice' *Oxford University Press* (1990) 35

⁸⁸ Braithwaite & Petit op cit (n87) 36

⁸⁹ Firearms Act, S.C. 1995, c. 39

‘At the expense of effective constitutional safeguards for the control of sentencing laws, the Supreme Court is not offering the next best thing to the offender who could be exposed to a cruel punishment: a constitutional exemption. The Supreme Court stops controlling the legislator from enacting unjust sentencing laws – a moral lesson suffices. Indeed, the Court will not apply the law in a case where an extremely disproportionate punishment could be inflicted on an extraordinarily likeable offender, but now, it will not offer a remedy to an unjust sentencing law. The judicial authority washes its hands, even if it sees an injustice done by the legislator!’⁹⁰

This new tendency of the Court towards constitutional minimalism represents an alarming deference to Parliament’s decision to impose mandatory minimum sentences, since only an independent judiciary can withstand the political allure of mandatory sentences.⁹¹ The exercise of any judicial discretion is now prevented, as the default penalty is predetermined by the legislator.

Roach suggests that ‘the choice over mandatory sentences may well be Parliament’s and it may only be the wisdom and self-restraint of Parliament that will prevent the whole-sale introduction of a raft of American-style mandatory penalties’.⁹² This is exacerbated by the fact that Canadian sentencing courts do not have the discretion to impose a sentence below the mandatory minimum prescribed by the law. In contrast to most other jurisdictions⁹³ where a judicial discretionary clause permits judges to impose a lesser sentence where exceptional circumstances exist, Canadian law does not offer judges such an ‘escape clause’ or provision for exceptional circumstances.⁹⁴ Consequently, Courts have to find a violation of the accused’s constitutional right in order to justify a departure from the norm.

The evolving jurisprudence of the Supreme Court shows that the shifts in both constitutional law and sentencing have changed the Court’s position when it is asked to determine whether a mandatory sentence is grossly disproportionate. Since *Smith*,⁹⁵ not only has the Court upheld mandatory minima, but it has steadfastly refused to strike down or abstain from applying a mandatory sentence as a form of cruel and unusual punishment under s12 of the Charter, or as an appropriate reparation in a case

⁹⁰ Dumont op cit (n27) 341

⁹¹ Ibid

⁹² Roach op cit (n63) 408

⁹³ For example, the United States of America and the Republic of South Africa

⁹⁴ Department of Justice Canada, Research and Statistics Division ‘Mandatory Sentences of imprisonment in common law jurisdictions: some representative models’ (2005) available at: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_10/rr05_10.pdf

⁹⁵ *R v Smith* supra (n57)

of state misconduct under s24(1) of the Charter. If there is no breach of s12 or 24(1), the Court cannot assess the s1 test of justification. The Court has therefore never had to determine whether one of the mandatory minimums constituted a ‘reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society’ or whether, as in the case of *Smith*,⁹⁶ Parliament could have tailored the mandatory penalty in a way that it would have been less restrictive.

On the one hand, the Canadian parliament continues to introduce mandatory sentences according to its own agenda, an agenda that can often hardly be reconciled with the codified sentencing principles. On the other hand, the Supreme Court of Canada has recently demonstrated a changing approach to Charter review and an increasing deference to parliament’s legislation. These factors account for the pitfalls of the current minimum mandatory sentences regime in Canada.

⁹⁶ Ibid

CHAPTER 3

THE PITFALLS OF MINIMUM MANDATORY SENTENCES IN CANADA

In many jurisdictions, the imposition of mandatory penalties has been criticised as being an inefficient way to achieve the sentencing purposes. Canada is no exception. Despite Parliament's enthusiasm and its new wave of mandatory minima, scholars continue to oppose the introduction of such sentences in the Canadian regime. Many arguments have been brought forward which raise serious doubts about the Parliament's choice.

3.1 Ordinal proportionality or the inflation of sentence severity

Until recently, Canada has had great stability in sentencing over the past half century and has avoided more punitive tendencies. Doob and Webster⁹⁷ explain that Canadian sentencing policies have historically been guided by the notion that multiple purposes of sentencing exist and that judges are responsible for choosing the most relevant purposes for each case. Canadian judges have had wide discretion to choose among the standard purposes of sentencing⁹⁸ and to sentence within a range determined largely by practice and by guidance from Appeal courts. Even when Parliament introduced the purposes and principles of sentencing in 1996, those provisions did not challenge the guiding notions which had been in place for decades as a result of judicial decisions.⁹⁹ In fact, the introduction of the purposes and principles of sentencing into legislation was seen as little more than a codification of the *status quo*. By referring to *all* the sentencing purposes, the codification offers little guidance and, accordingly, has had little impact on sentencing practices at the trial court level.¹⁰⁰

Nevertheless, some changes have been reflected in the Supreme Court's decisions since it invalidated a mandatory sentence under s12 of the Charter in *Smith*.¹⁰¹ In particular, the Court has increased its focus on the gravity of the offence committed by

⁹⁷ AN Doob, Webster, C Marie 'Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate' (2006) 40 *Law & Society Review* 325

⁹⁸ Such as denunciation, individual and general deterrence, incapacitation, rehabilitation and reparations to victim and community.

⁹⁹ Doob, Webster, Marie op cit (n97) 339

¹⁰⁰ Roberts op cit (n24) 313

¹⁰¹ *R v Smith* supra (n57)

the offender; it has increased its concern about the need to denounce crimes and punish them proportionately;¹⁰² and it has greater acceptance of the ability of Parliament to emphasise the punitive purposes of sentencing by enacting mandatory sentences.¹⁰³

One can argue that this direction of the Court is not in accordance with the fundamental principle of proportionality as adopted in the 1996's reform of the Criminal Code. Roberts, Dumont and Roach adopt this point of view. For Roberts,¹⁰⁴ 'mandatory sentences are inconsistent with the principle of proportionality and indeed with a sentencing system based on the "just deserts" philosophy'. Dumont,¹⁰⁵ for her part, suggests that the principle of proportionality signifies a rejection of the idea of achieving general deterrence by making a particular sentence more severe and imposing exemplary punishment on a specific criminal. The deterrent impact of a particular sentence is not supported by empirical research¹⁰⁶ and so it is questionable whether it has any effect on the crime rate. Dumont therefore suggests that the principle of proportionality should be re-established on a firmer ground to measure crimes and punishments. In her opinion, proportionality should be applied to allow sentencing flexibility and moderation, as opposed to the logic of escalation that the Supreme Court and the legislator are currently applying in sentencing.

On the other hand, Roach¹⁰⁷ argues that adherence to the principle of proportionality, combined with the advent of mandatory minimum sentences of imprisonment, will cause the inflation of sentence severity, as minimum sentences provide a starting point, or floor, for a proportional scale of punishment. In order to retain proportionality in the face of the new minimum sentences, the entire range of sentences for one particular offence will have to shift upward. If the mandatory sentence is designed for the 'best' offender and the 'best' offence within a particular crime, it should require punishment above the mandatory minimum for more blameworthy offenders. In this way, 'a concern about maintaining the proportionality

¹⁰² See *R v Goltz*, *R v Morrissey* and *R v Latimer* in Roach op cit (n63) 381-382

¹⁰³ Roach op cit (n63) 381

¹⁰⁴ Roberts op cit (n24) 313

¹⁰⁵ D Cousineau 'Canadian Sentencing Commission, Sanctions Légales et Dissuasion' (1988) in Dumont op cit (n27) 342

¹⁰⁶ Ibid

¹⁰⁷ Roach op cit (n63) 402

of relative punishment can increase punishment to keep up with the inflated floor that Parliament has set for the best offender and the best offence'.¹⁰⁸

Roach¹⁰⁹ further suggests that mandatory minima may influence sentencing patterns by inflating the severity of sentences imposed for *other* offences as well. He based his analysis on the logic of ordinal proportionality that Madame Justice Arbour adopted in the cases of *Wust*¹¹⁰ and *Morrissey*.¹¹¹ In the latter, she put her argument as follows:

'To the extent possible, mandatory minimum sentences must be read consistently with the general principles of sentencing expressed, in particular, in ss. 718, 718.1 and 718.2 of the *Criminal Code*: *Wust* (S.C.C.), *supra*, at para. 22. By fixing a minimum sentence, particularly when the minimum is still just a fraction of the maximum penalty applicable to the offence, Parliament has not repudiated completely the principle of proportionality and the requirement, expressed in s. 718.2(b), that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Therefore, in my view, the mandatory minimum sentences for firearms-related offences must act as an inflationary floor, setting a new minimum punishment applicable to the so-called "best" offender whose conduct is caught by these provisions. The mandatory minimum must not become the standard sentence imposed on all but the very worst offender who has committed the offence in the very worst circumstances. The latter approach would not only defeat the intention of Parliament in enacting this particular legislation, but also offend against the general principles of sentencing designed to promote a just and fair sentencing regime and thereby advance the purposes of imposing criminal sanctions.'¹¹²

Referring to the requirement that punishment should reflect the comparative seriousness of crimes, Roach extrapolates from Madame Justice Arbour's logic to include:

'a concern with the "rank ordering" of different offences in the sense that "punishing one crime more than another expresses more disapproval for the former crime, so that it is justified only if that crime is more serious". Punishments thus are ordered on a penalty scale so that their relative severity reflects the seriousness ranking of the crimes involved.'¹¹³

The problem is that the Supreme Court, judging by its recent decisions on the constitutionality of mandatory minimum sentences for various offences, has already concluded that these sentences were proportionate or at least not so grossly disproportionate as to constitute cruel and unusual punishment. Thus, these mandatory minima are now the starting point for the courts to apply, as created by Parliament and

¹⁰⁸ Roach op cit (n63) 383

¹⁰⁹ Ibid

¹¹⁰ *R v Wust* 2000 1 S.C.R. 455

¹¹¹ *R v Morrissey* *supra* (n74)

¹¹² *R v Morrissey* *supra* (n74) at 75

¹¹³ Roach op cit (n63) 384

approved by the Court. Given the logic of ordinal proportionality as the fundamental principle of sentencing, every offence more serious than the ones for which a minimum sentence has been found constitutional should merit more severe punishment than the prescribed minimum for the original offence.

Roberts,¹¹⁴ in response to Roach's proposition, argues that the available empirical evidence suggests that sentences for an offence often cluster around the mandatory minimum penalty. For him, the core tenets of Canadian sentencing policy will not allow the mandatory minimum penalties to influence the range of sentences for a specific offence or sentencing patterns for other offences.¹¹⁵ Roberts concedes, however, that the practice of imposing the same punishment violates the ordinal proportionality principle. In any event, judicial concerns about maintaining proportionality are not coherent with Parliament's decision to enact mandatory sentences.

3.2 Categorical judgments as to the seriousness of crimes

Another way in which the imposition of mandatory minimum sentences is not coherent with the application of the principle of proportionality is that they impose categorical judgments as to the seriousness of crimes. Roberts¹¹⁶ illustrates this issue with the offence of manslaughter in the context of a case from the Ontario Court of Appeal.¹¹⁷ Since 1995, manslaughter perpetrated with a firearm now carries a four-year minimum term of custody.¹¹⁸ By creating this minimum, Parliament has deemed this form of unintentional homicide to be more serious and more worthy of denunciation than manslaughter committed by other means.¹¹⁹ In *R. v. Turcotte*,¹²⁰ the offender had used two telephone cords to strangle his frail, elderly mother. He was convicted of manslaughter and received a community-based sanction, which was

¹¹⁴ The Canadian Sentencing Commission found that almost all firearm-based sentences clustered around the one-year mandatory minimum, while the most recent data suggest that two thirds of firearm-based sentences cluster around the new four-year mandatory minimum. See Roberts op cit (n43) 247

¹¹⁵ Roberts op cit (n24) 316

¹¹⁶ Roberts op cit (n24) 320

¹¹⁷ *R v Turcotte* (2000) 144 CCC (3d) 139

¹¹⁸ Section 236 (a) Criminal Code, R.S.C. 1985, c. C-46

¹¹⁹ Roberts op cit (n24) 319

¹²⁰ *R v Turcotte* supra (n117)

upheld by the Ontario Court of Appeal. If the offender had used a firearm, he would have been sentenced to a minimum of four years in prison.

This gradation of offences appears even more shocking when we consider the comparison that Roberts offers between a case of robbery involving a firearm and non-firearm manslaughter such as *Turcotte*.¹²¹ Here, again, the use of a firearm would have led to a four-year mandatory minimum sentence for the former offender, while the latter could receive a community-based sanction. The two cases chosen by Roberts underline the absurd outcomes which result from a simplistic application of the theory of proportionality relating to the seriousness of crimes. Seen in this light, the mandatory minima do not serve the interests of justice. Moreover, it can be argued that prescribed minima may infringe the core principles of judicial justice.

3.3 Removal of judicial discretion, plea-bargaining and a threat to the presumption of innocence

A national survey of judges conducted by the Canadian Sentencing Commission in 1988¹²² revealed that mandatory minima find little support among members of the judiciary. This survey took place during the heyday of the Charter, a year after the Supreme Court's judgment against mandatory minima in *Smith*¹²³ and before the shift that took place within the Court in subsequent years. When judges were asked whether minimum sentences restricted the court's ability to 'give out a just sentence', over half of the respondents said that it was.¹²⁴ Roberts suggests that the fact that sentences for an offence often cluster around the mandatory minimum penalty demonstrates the judicial antipathy towards mandatory minimum terms of imprisonment.¹²⁵ Even when a mandatory minimum is prescribed for a particular offence, judges might be expected to use the full range of possible penalties, up to the maximum sentence, to reflect the gravity of the offence. In reality, the judges prefer to impose sentences akin to the

¹²¹ *R v Turcotte* supra (n117)

¹²² Canadian Sentencing Commission 'Views of Sentencing: a Survey of Judges in Canada' (1988) in JV Roberts 'Public opinion and mandatory sentencing: A review of international findings' (2003) 30 *Criminal Justice and Behavior* 505

¹²³ *R v Smith* supra (n57)

¹²⁴ 57 per cent. Only 9 per cent of trial judges indicated that mandatory minimum sentences 'never restricted their ability to impose a just sentence'. See Report of the Canadian Sentencing Commission op cit (n44) 180

¹²⁵ Roberts op cit (n122) 498

prescribed minimum, and so the mandatory minimum has become the *de facto* mandatory sentence.¹²⁶

regardless of his or her culpability, might be placed under great pressure to plead guilty. Finally, by increasing the likelihood of plea-bargaining, mandatory minimum sentences generally reduce the likelihood of conviction for certain specific offences and therefore work contrary to the legislator's objective of punishing offenders who commit those offences.¹³²

3.4 Do mandatory minimum sentences create injustices?

As we have seen, the imposition of mandatory penalties in Canada does not allow any discretion for judges. The lack of an 'escape clause' prevents the judiciary from departing from their imposition, unless the defence can meet the high burden of proof that the sentence represents a cruel and unusual punishment in the circumstances.¹³³ This means that mandatory sentences will apply to every offender regardless of their individual characteristics and are thus likely to create injustice. As Roach¹³⁴ recognises, one of the arguments put forward in favour of mandatory sentences is that they will hopefully provide protection for various disadvantaged groups that are subject to disproportionate victimisation. However, the same mandatory treatment of every offender will result in injustices when minimum sentences are applied to exceptional offenders who belong to disadvantaged groups that are supposed to be protected by the mandatory penalties. In practice, individuals such as women, the young, Aboriginal people, the disabled, and other vulnerable minorities who are thought to be protected by mandatory sentences may also end up being unfairly punished by them. For instance, incarcerating women adversely impacts on their health because of infrequent contact with family members and cohabitating with drug-using and mentally ill inmates.¹³⁵

The Collaborating Centre for Prison Health and Education (CCPHE) has also expressed concern about the imposition of mandatory minimum sentences. A very

¹³² Ibid

¹³³ Section 12 Canadian Charter of liberties and freedoms (The Constitution Act of 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, part 1)

¹³⁴ Roach op cit (n63) 378

¹³⁵ N Douglas, E Plugge, R Fitzpatrick *The impact of imprisonment on health: what do women prisoners say?* in J Lau & RE Martin 'Health impacts of the Safe Streets and Communities Act (Bill C-10); Responding to Mandatory Minimum Sentencing' Collaborating Centre for Prison Health and Education (2012) 20

recent study¹³⁶ conducted by the Centre reveals that mandatory penalties have both negative health and social impacts. Indeed, research has shown that prisoners constitute a disadvantage group in themselves as, compared with the general population, they have poorer physical and mental health which only contributes further to their criminal activity when they are released from prison.¹³⁷ For this reason, the CCPHE argues that the imposition of mandatory minimum sentences is not likely to improve public safety, but actually to create the opposite effect.¹³⁸ The Centre highlights that:

‘Currently, Canadian prisons do not deliver continuity of health care or continuity of social services such as counselling, mother-baby programs and harm reduction strategies. All of these services would enable inmates to successfully transition back into the community. Therefore, harsher sentencing coupled with a lack of prison reform fails to address the relationship between poor physical/mental health and criminal behaviour.’¹³⁹

Moreover, CCPHE argues that the fact that many criminals suffer from mental health or addiction problems which compromise their decision-making abilities calls into question the logic behind mandatory sentences.¹⁴⁰ One of the main arguments put forward by the proponents of mandatory minima is that if individuals know the penalties beforehand they will be deterred from committing crime. The problem with this rationale is that it assumes that all crimes are premeditated and that individuals have the capacity to weight up the associated costs and benefits.¹⁴¹

As mental issues and addiction problems alter this capacity for many individuals, one cannot assume that mandatory minima will achieve this purpose. For example, studies have shown that offenders do not discriminate between sentences of three years and five years when considering the punitive consequences of their actions.¹⁴² This demonstrates that severity of sentences and the imposition of mandatory penalties are

¹³⁶ Lau & Martin op cit (n135) 20

¹³⁷ S Fazel, J Baillargeon ‘The health of prisoners’ (2010) *The Lancet* 20; RD Schroeder, TD Hill, SH Haynes, C Bradley ‘Physical health and crime among low income urban women: An application of general strain theory’ (2011) 1 *Journal of Criminal Justice* 21-9 in Lau & Martin op cit (n135) 19

¹³⁸ Lau & Martin op cit (n135) 7

¹³⁹ Ibid

¹⁴⁰ Lau & Martin op cit (n135) 6

¹⁴¹ C Mascharka C ‘Mandatory minimum sentences: exemplifying the law of unintended consequences’ (2000) 28 *Fla. St. UL Rev.* 935 in Lau & Martin op cit (n135) 19

¹⁴² T Gabor, N Crutcher ‘Mandatory minimum penalties: Their effects on crime, sentencing disparities, and justice system expenditures’ Department of Justice Canada, Research and Statistics Division (2001)

not necessarily likely to deter offenders from committing crimes, but can easily create disparities.

As has been demonstrated, the imposition of mandatory minima is far from being unanimously supported and raises strong opposition in certain quarters. Nevertheless, this has not prevented the Canadian government of incorporating such penalties in its new legislation.

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CHAPTER 4

SAFE STREETS AND COMMUNITIES ACT

4.1 Socio-political background

In June 2011, the Canadian Prime Minister promised the nation that his Government would ‘move quickly to re-introduce comprehensive law-and-order legislation to combat crime and terrorism’.¹⁴³ Such discourse is surprising considering that Canada is considered to be one of the safest countries in the world, with a crime rate that has actually been declining over recent years.¹⁴⁴ Nevertheless, the Conservative government has kept promoting the war on crime in order to justify the introduction of the *Safe Streets & Communities Act*,¹⁴⁵ often referred to as the Omnibus Crime Bill:

‘[T]his bill is a reflection of our commitment to tackling crime, increasing public safety, and restoring the confidence of Canadians in the justice system.’¹⁴⁶

[...]

‘The Harper Government is committed to keeping our streets and communities safe. Youth crime and violence are serious concerns for many Canadian families and communities, which is why I am happy to announce today that we are once again investing in community-based projects that help those who are most at risk of offending. Projects that receive funding will provide at-risk youth with life skills that will empower them to make smart choices and to stay away from crime.’¹⁴⁷

On 12 March 2012, Bill C-10 was passed by the House of Commons in its final vote, with 154 Members of Parliament voting in favour and 129 against.¹⁴⁸ The *Safe Streets and Communities Act* actually comprises nine smaller bills which were proposed by

¹⁴³ Conservative Canadian government ‘Speech from the Throne’ *Background: Safe Streets & Communities Act*, available at http://www.justice.gc.ca/eng/news-nouv/nr-cp/2012/doc_32713.html

¹⁴⁴ The police-reported crime rate, which measures the total volume of crime per 100,000 population, continued to decline in 2011, down 6 per cent from the previous year. Overall, this marked the eighth consecutive decrease in Canada’s crime rate. Since peaking in 1991, the crime rate has generally been decreasing, and is now at its lowest point since 1972. See S Brennan ‘Police-reported crime statistics in Canada’ (2011) available at <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11692-eng.htm#a1>

¹⁴⁵ *Safe and Streets Communities Act*, S.C. 2012, c.1

¹⁴⁶ KL Findlay ‘Parliamentary Secretary to the Minister of Justice’, available at <http://openparliament.ca/bills/40-3/C-39/>

¹⁴⁷ Honorable Senator Pierre-Hugues Boisvenu ‘Press Release of the Department of Public Safety Canada’ (13 September 2012) available at <http://www.publicsafety.gc.ca/media/nr/2012/nr20120913-eng.aspx>

¹⁴⁸ Vote 156 on March 12 2012, 41st Parliament, 1st Session, available at <http://openparliament.ca/bills/votes/41-1/156/>

the Conservatives when they were a minority government, but were never passed. With the new Conservative majority in both the House of Commons and the Senate, the Act passed all the measures at once. These are:

- The *Protecting Children from Sexual Predators Act* (former Bill C-54), which proposes increased penalties for sexual offences against children, as well as creating two new offences aimed at conduct that could facilitate or enable the commission of a sexual offence against a child;
- The *Increasing Penalties for Organized Drug Crime Act* (former Bill S-10), which targets organised crime by imposing tougher sentences for the production and possession of illicit drugs for the purposes of trafficking;
- The *Protecting the Public from Violent Young Offenders Act* (former Bill C-4), which ensures that violent and repeat young offenders are held accountable for their actions and that the protection of society is a paramount consideration in the treatment of young offenders by the justice system;
- The *Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act* (former Bill C-16), which eliminates the use of conditional sentences, or house arrest, for serious and violent crimes;
- The *Increasing Offender Accountability Act* (former Bill C-39), which enshrines a victim's right to participate in parole hearings and addresses inmate accountability, responsibility, and management under the *Corrections and Conditional Release Act*;
- The *Eliminating Pardons for Serious Crimes Act* (former Bill C-23B), which extends the ineligibility periods for applications for a record suspension (currently called a 'pardon') to five years for summary conviction offences and to ten years for indictable offences;
- The *International Transfer of Canadian Offenders Back to Canada Act* (former Bill C-5), which adds additional criteria that the Minister of Public Safety could consider when deciding whether or not to allow the transfer of a Canadian offender back to Canada to serve their sentence;
- The *Justice for Victims of Terrorism Act* and related amendments to the *State Immunity Act* (former Bill S-7), which allows victims of terrorism to sue perpetrators and supporters of terrorism, including listed foreign states, for loss or damage that occurred as a result of an act of terrorism committed anywhere in the world; and
- The *Protecting Vulnerable Foreign Nationals against Trafficking, Abuse and Exploitation Act* (former Bill C-56), which authorises immigration officers to refuse work permits to vulnerable foreign nationals when it is determined that they are at risk of humiliating or degrading treatment, including sexual exploitation or human trafficking.

The *Safe Streets & Communities Act* hence introduces new mandatory minimum sentences in the Canadian justice system for crimes related to drugs and sexual offences against children. However, the Act has not received the support of the majority of the population and opposition parties. The fact is that 'being hard on crime' has not been the traditional policy advocated throughout the Canadian legislation history.

4.2 Opposition to the Act

The first opposition comes from the Canadian Sentencing Commission. In its 1988 Report, in addition to recommending the abolition of mandatory minimum sentence for all offences except murder and high treason, the Canadian Sentencing Commission recommended that the government of Canada adopt a system of presumptive guidelines that would be established by a permanent sentencing commission and confirmed by Parliament.¹⁴⁹ Presumptive sentencing guidelines set a range of penalties for an offence, based on the seriousness of the offence and the defendant's criminal history. The guidelines are presumptive in the sense that they set sentencing standards for individual cases that are presumed to be appropriate and that judges are expected to follow unless they document the reasons for departing from the norm.¹⁵⁰ While judges are required to adhere to the guidelines, these also provide an opportunity for them to depart of prescribed minima.

The elaboration of sentencing guidelines today could constitute a welcome alternative to mandatory minimum sentences, as it would respect the statutory principles and reintroduce the discretionary power of sentencing judges. Indeed, presumptive guidelines operate in a similar way to an escape clause, preserving the opportunity for judges to depart from prescribed minima when they can reasonably justify this in the circumstances of a case, thereby exercising their discretionary power. Such a requirement would definitely be less severe and more accessible than the two-levels requirement, developed by the Supreme Court, which is currently imposed on Canadian judges.¹⁵¹

In addition, such guidelines could have been regularly reviewed by both the commission and Parliament and therefore would have constituted a more accurate and flexible alternative to statutory mandatory sentences. Moreover, these guidelines could have been elaborated on the basis of the principles which were later incorporated into

¹⁴⁹ Doob, Webster & Marie op cit (n97) 351

¹⁵⁰ M Torny & K Hatlestad (eds.) 'Sentencing Reform in Overcrowded Times' (1997) 7-8 in LM Seghetti & AM Smith *Federal Sentencing guidelines: Background, Legal Analysis and Policy Options (CRS Report for Congress)* (2007) 14

¹⁵¹ First, Judges must conclude that the prescribed minimum represents a grossly disproportionate and excessive punishment in the circumstances or that the accused has been victim of a particularly egregious form of misconduct by the State during or following the perpetration of the offence. Second, Judges must conclude that such a violation of the accused's rights is not justified under section 1 of the Charter – See under Section 2.4 Mandatory minimum sentences and the statutory principles of sentencing

the *Criminal Code*,¹⁵² to ensure that these principles were not infringed during the sentencing process.

In the event, the Canadian Sentencing Commission recommendation was not followed because it was found that such guidelines would compromise the great discretionary power of sentencing judges who, at the time, were given complete responsibility for sentencing.

The Canadian government has endorsed the same attitude and favoured the introduction of mandatory minimum sentences into the *Safe Streets & Communities Act*. Despite wide-ranging concerns raised by opposition parties and various interest groups¹⁵³ about the legislation, the Canadian government did not take into account the expressed recommendations.

Among others, The Canadian Criminal Justice Association has unequivocally stated its opposition to the introduction of minimum sentences for certain sexual offences with respect to children as well as those related to drug offences:

‘Under section a) of this proposed legislation, mandatory minimum penalties will be increased or imposed, and maximum penalties increased, for certain sexual offences with respect to children. The CCJA has historically taken an oppositional position on the issue of mandatory minimum penalties. In sum, criminologists have noted the danger that mandatory minimum sentences could lead to prison over-crowding, increased violence and lack of access to rehabilitative programming that accompanies over-crowding.’

The CCJA continues:

‘The amendments to the Controlled Drugs and Substances Act which create mandatory minimum sentences for “serious” drug offences are, in the opinion of the CCJA unlikely to have a significant deterrent effect on the production and sale of illicit substances and are likely to create situations where the mandatory minimum sentence is disproportionate to the harm of the offence. Further, the use of mandatory minimum penalties (combined with the proposed restrictions on the use of conditional sentences) is likely to put a great deal of pressure on provincial correctional systems, which already face over-crowding and a lack of resources for rehabilitative measures. Further, mandatory minimum sentences allow no leniency for offenders who accept responsibility for their crime and plead guilty, thereby ensuring an increase in “not guilty” pleas and subsequent trials that are likely to pose a significant workflow problem for our court system. The backlogging of the court system also has implications for miscarriages of justice: According to Juristat, the average time to dispose of a criminal case in Canadian courts is already 124

¹⁵² ‘The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives [...]’, Section 718 Criminal Code, R.S.C.1985, c. C-46

¹⁵³ For example, The Canadian Bar Association, representing over 37,000 lawyers across the country, has identified 10 reasons why the passage of Bill C-10 will be a mistake and a setback for Canada. See CBA/ABC ‘10 reasons to Oppose Bill C-10’ (2011)

days (Thomas 2010). Under the Charter, Canadians charged with an offence are guaranteed the right to be “tried within a reasonable amount of time”. Court backlogs due to increased numbers of trials risks creating a situation in which cases will be dropped because the system cannot process them within a “reasonable amount of time”.¹⁵⁴

Regardless of opposition, this piece of legislation has been passed very recently and illustrates once again that the government’s agenda is not necessarily aligned with the codified principle of sentencing.

Through the years, not only has opposition been raised but many alternatives to mandatory penalties have also been put forward. For example, Michael Tonry¹⁵⁵ has made a number of suggestions about how the harm caused by mandatory minimum sentences could be minimised. He suggests, *inter alia*, adding ‘sunset’ provisions to mandatory penalty laws so that they would automatically be repealed unless re-enacted by the legislature. A similar clause featured in the South African mandatory minimum Act,¹⁵⁶ which was initially meant to be a temporary measure for twelve months. However, as will become apparent in Section 7.1 of this paper, Parliament repeatedly re-enacted the dispositions until it repealed the sunset clause in 2007, making the Act permanent.

The introduction of an exemption clause, like the proposed introduction of presumptive guidelines as recommended by Canadian Sentencing Commission, would have been a means to preserve judicial discretion in the sentencing process. It would have allowed some flexibility for judges to take into account exceptional circumstances and choose not to sentence an offender to the presumptive minimum. At the very least, it would have allowed Parliament to enact mandatory and not presumptive minimum sentences for various offences, but would have provided for an ‘escape clause’ for departure from the imposed of the mandatory minima. In many jurisdictions, judicial discretion is maintained by such a clause, which prevents some of the main problems in Canadian jurisdiction regarding mandatory penalties, such as avoiding injustices and respecting the principle of proportionality. South Africa is one such jurisdiction and the ‘substantial and compelling circumstances’¹⁵⁷ clause was

¹⁵⁴ Canadian Criminal Justice Association ‘Bill C-10 Safe Streets and Communities Act – Brief to the Standing Committee on Justice and Human Rights’ (2011)

¹⁵⁵ M Tonry ‘Mandatory Penalties’ in *Crime and Justice: A review of Research* (1992) 243 in Doob & Cesaroni op cit (n15) 302

¹⁵⁶ Section 53 Criminal Law Amendment Act 105 of 1997

¹⁵⁷ Section 51[3](a) Criminal Law Amendment Act 105 of 1997

incorporated into its legislation in 1997. However, as will be demonstrated, while such a clause provides a good alternative in theory, its application can generate many difficulties.

CHAPTER 5

SENTENCING IN SOUTH AFRICA

1994 marked the start of a new democratic era in South Africa. Before that, the sentencing scene had been fairly constant. The *Criminal Procedure Act 51 of 1977* included a wide range of possible punishments. Among them, imprisonment was commonly imposed for serious offences, and capital punishment remained available for the most heinous crimes even though a moratorium had prevented any execution since 1989.¹⁵⁸ Limited to less serious offences, fines were the most commonly imposed punishment. Corporal punishment was also a widely imposed punishment for juvenile offenders. The Act remains applicable today and, together with common law principles, it constitutes the principal guidelines for sentencing.

5.1 Sentencing guidelines

The first framework provided by the South African legislature in the sentencing process is determined at the level of the trial court.¹⁵⁹ Most sentences are still set out in the *Criminal Procedure Act 51 of 1977*, and no court may impose a form of punishment other than that specifically provided for in legislation.¹⁶⁰

Many of the more serious South African offences are not contained in any statute, but are still common law offences.¹⁶¹ Likewise, many of the sentencing principles are not part of the written legislation, but rather common law principles. South Africa's Law Commission proposed a sentencing framework¹⁶² based on a scheme of desert-

¹⁵⁸ S Terblanche 'Sentencing: Changes and effect since 1994' Center for Study of Violence and Reconciliation Criminal Justice Conference Proceedings (7-8 February 2005) available at <http://www.csvr.org.za/wits/confpaps/terreblanche.htm>

¹⁵⁹ The District (Magistrate) courts are at the bottom of the range and have a normal punitive jurisdiction of up to three years' imprisonment. The intermediate criminal courts are the regional courts, where up to fifteen years' imprisonment per charge can be imposed. The High courts are the highest trial courts in South Africa, and may impose any sentence provided for by the Legislature, including any fine and imprisonment of up to life imprisonment. See section 92 of the Magistrates' Courts Act 32 of 1944

¹⁶⁰ S Terblanche & JV Roberts 'Lacking in principle but delivering on justice?' (2005) 18 *S.A.J.C.J.* 189

¹⁶¹ Such as murder, robbery, theft, fraud and assault, see Terblanche & Roberts op cit (n160) 191

¹⁶² South Africa Law Commission 'Discussion Paper 91: Sentencing (A New Sentencing Framework)' (June 1997)

oriented sentencing guidelines.¹⁶³ However, the proposed Bill has never been before Parliament.¹⁶⁴ Hence the South African jurisdiction recognises its principles of sentencing as derived from the common law, as opposed to the Canadian jurisdiction where some general principles and purposes were explicitly incorporated into legislation in 1996.¹⁶⁵

In 1969, *Zinn*¹⁶⁶ provided the first basic triad of sentencing considerations. These principles are still applied by the Courts today. This triad is based on ‘the nature of the offence, the personal circumstances of the appellant and the interests of the community’.¹⁶⁷ At the time, the Court did not provide more specific guidance on which of the appellant’s personal circumstances should be taken into account or what constitutes the interests of the community. The only guidance put forward by judge Rumpff JA was that, in the sentencing process, each of these three factors must ‘[be] properly balanced with one another’.¹⁶⁸

The adoption of statutory, explicit, or at least more specific sentencing guidelines into South Africa’s legislation might have subsequently facilitated the interpretation of the exemption clause,¹⁶⁹ which was subsequently adopted concerning the imposition of mandatory minimum sentences. Indeed, as we will see under section 6.2 of this paper, the Supreme Court of Appeal further stipulated that the exemption clause must be interpreted in the light of ‘all the factors that would traditionally be relevant to sentencing’.¹⁷⁰ Considering that the common law principles contained in the sentencing triad have been left to the courts’ interpretation, they do not provide much guidance when later invoked to interpret the law.

The stipulation of statutory sentencing guidelines faced one major difficulty: South African courts shared a tradition of judicial discretion in the sentencing process. Hence, courts do not like to see the exercise of this discretion fettered, whether by the adoption of strict sentencing guidelines or by the imposition of mandatory sentences.

¹⁶³ A von Hirsch & A Ashworth ‘Proportionate Sentencing: Exploring the Principles’ (2005) *Oxford press University* 6

¹⁶⁴ M O’Donovan & J Redpath ‘The impact of minimum sentencing in South Africa – Report 2’ (2006) *Open Society Foundation for South Africa* 12

¹⁶⁵ Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

¹⁶⁶ *S v Zinn* 1969 (2) SA 537 (A)

¹⁶⁷ *S v Zinn* supra (n166) at 540G

¹⁶⁸ *Ibid*

¹⁶⁹ Section 51[3](a) Criminal Law Amendment Act 105 of 1997

¹⁷⁰ *R v Malgas* 2001(1) ACR 468 (SCA) at 9

5.2 Sentencing principle: a wide discretionary power for judges

Similarly to Canada, the perception of the judicial function in the South African sentencing context was that it had to include the exercise of a wide, if not quasi-unfettered, sentencing discretion. This discretionary power has long been recognised as a prerogative for sentencing judges: ‘The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than the appellate tribunal’.¹⁷¹

As in other countries where sentencing judges have a wide discretion to impose sentences, the general purposes of sentencing have been used to depart from a predetermined mandatory sentence and to justify a different, more appropriate sentence in the circumstances. These purposes, inherited from the common law, have been recognised and applied by South African judges:

‘In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by DAVIS AJA in *R v. Swanepoel*, 1945 AD 444 at 455, namely, deterrent, preventive, reformatory and retributive, (See *S v. Whitehead*, 1970(4) SA 424(A) at 436E-F; *S v. Rabie*, 1975(4)SA855(A) at 862).’¹⁷²

The imposition of mandatory sentences, which apparently contradict this discretion, has been highly criticised, based on pragmatic arguments as well as constitutional principles.¹⁷³ In the mid-1970s, Mr Justice Viljoen, then president of The Commission of Inquiry into the Penal System,¹⁷⁴ helped develop the pragmatic argument that judges hold a unique position and are the most suited to impose appropriate sentences.

As in Canada, it is in the context of drug related offences that the imposition of mandatory sentences was first criticised.¹⁷⁵ At the time, the South African Constitution did not provide for the accused’s right against cruel and unusual punishment. Mr Justice Viljoen was thus unable to use the argument, put forward by the Supreme

¹⁷¹ *R v Mapumulo and Others* 1920 AD 56 at 57

¹⁷² *S v Khumalo and Others* 1984 ZASCA 30 at 10

¹⁷³ D van Zyl Smit, ‘Mandatory Sentences: A Conundrum for the new South Africa?’ (2000) 2 *Punishment and Society* 198

¹⁷⁴ ‘Report of the Commission of Enquiry into the Penal System of the Republic of South Africa’ (Viljoen Report) (1976) following which mandatory minimum sentences were removed from South African law

¹⁷⁵ Viljoen Commission (1976) at para 5.1.4.1.2 in van Zyl Smit op cit (n173) 198: ‘[...] but objected to such sentences including a mandatory sentence of five years imprisonment for dealing in even small quantities of drugs.’

Court of Canada,¹⁷⁶ that a mandatory minimum sentence in this context would constitute the violation of this right. Nevertheless, he firmly rejected the imposition of mandatory minimum sentences, basing his argument on the appreciation of the general purposes of sentencing: he suggested that using deterrent sentences to stamp out the use of drugs was ‘from a retributive point of view, outrageously unreasonable’.¹⁷⁷

The second argument put forward in favour of judicial sentencing discretion in South Africa relied on the constitutional principle of the separation of powers. This argument gained prominence from the 1960s onwards as the Government sought to criminalise severely any form of political resistance to its authority.¹⁷⁸ The primary pragmatic argument for judicial independence was consequently backed by political opposing groups, which maintained that judges were not only in a unique position to select the appropriate sentence, but were constitutionally required to do so.¹⁷⁹ Judges strongly supported this line of thought, and it is in the context of political cases¹⁸⁰ that the imposition of mandatory sentences sparked the most controversy.

At the dawn of democracy, South Africa adopted an interim version of a new Constitution,¹⁸¹ which guaranteed the independence of the judiciary and included a justiciable Bill of Rights.¹⁸² This progressive constitutional framework, based on existing foreign constitutions, was promising for the country. Indeed, unlike other constitutions that celebrate long-standing tradition and endorse the past,¹⁸³ the new Constitution focuses on law as a vehicle for change. Its preamble clearly shows that the intention was to move away from the past:

We, the people of South Africa,
Recognise the injustices of our past;
[...] We therefore, through our freely elected representatives, adopt this Constitution as
the supreme law of the Republic so as to

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

¹⁷⁶ *R v Smith* supra (n57)

¹⁷⁷ Viljoen Commission op cit (n174) 5.1.4.1.7

¹⁷⁸ van Zyl Smit op cit (n173) 199

¹⁷⁹ Hansard (1983) in van Smit op cit (n173) 199

¹⁸⁰ See, for example, the cases of *S v Mpetha* (1985), *S v Toms*; *S v Bruce* (1990) in van Zyl Smit op cit (n173) 199

¹⁸¹ The Constitution of the Republic of South Africa of 1993, subsequently the Constitution of the Republic of South Africa Act 108 of 1996

¹⁸² Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996

¹⁸³ For example, the preamble of the Canadian Charter of Rights and Freedoms (Constitution Act of 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, part 1) simply says: ‘Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.’

- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. [...]

The final version of the Constitution¹⁸⁴ was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. Adding to the newly established democracy, the Constitution appeared to have strengthened the power and independence of the judiciary: it provided for a Constitutional Court with final jurisdiction on constitutional matters and explicitly replaced the sovereignty of Parliament by the supremacy of the Constitution. Hence, this legislation indicated that the intention in 1996 was for the courts to be given more, rather than less, power. Accordingly, the discretionary power of sentencing judges should have been bolstered, as they were already perceived as requiring wide discretion in the exercise of their power.

While the new Constitution strengthened judicial independence, its Bill of Rights also appeared to be a tool used against the imposition of mandatory sentencing.

5.3 *Makwanyane* and its backlash

As we have seen, South Africa has adopted a system of Constitutional Supremacy with judicial review. This gives the courts powers to decide matters which are on the legislative agenda. Moreover, in a constitutional democracy, courts are the primary protectors and final arbiters of constitutional rights.¹⁸⁵

The pairing of the new South African Constitution with a Bill of Rights gave the newly established Constitutional Court tools to address statutory mandatory penalties. The first time the Court relied on the Bill of Rights to attack the validity of sentencing legislation was in the context of capital punishment. In 1995, in *S v. Makwanyane*,¹⁸⁶ the Constitutional Court adopted the same logic as the Supreme Court of Canada¹⁸⁷ to conclude that the sentence to be imposed would have infringed the constitutional rights of the accused and was, therefore, unconstitutional.

¹⁸⁴ Constitution of the Republic of South Africa Act 108 of 1996

¹⁸⁵ S Jagwanth, UNESCO Discussion Paper 65 'Management of Social Transformations – MOST; Democracy, Civil Society and the South African Constitution: some challenges' (2003) 15

¹⁸⁶ *S v Makwanyane* 195 (2) SACR 1 (CC)

¹⁸⁷ *R v Smith* supra (n57)

In this case, the two accused were convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts.¹⁸⁸ Although capital punishment was not mandatory, it was at the time a competent sentence for the crime of murder under s277(1)(a) of the Criminal Procedure Act.¹⁸⁹ However, the death penalty was inconsistent with s11(2) of the South African Constitution,¹⁹⁰ which offers protection against cruel, inhuman, or degrading punishment. Consequently, one of the effects of the Court judgment was to prohibit the State, or any of its organs, from executing persons whose appeals against death sentences had been disposed of¹⁹¹ and, subsequently, prohibited the imposition of death penalty.

In common with the conclusion of the Supreme Court of Canada in the case of *Smith*,¹⁹² which concluded that a mandatory sentence of seven years' imprisonment for importing narcotics constituted a violation of the prohibition against cruel and unusual punishment,¹⁹³ the South African Constitutional Court agreed that 'proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading.'¹⁹⁴ The Court thus acknowledged that proportionality in sentencing was a principle recognised under the Constitution:

'Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading. [...] Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue. It may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But these factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by section 11(2) has been crossed they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life.'¹⁹⁵

¹⁸⁸ *S v Makwanyane* supra (n186) at 1

¹⁸⁹ Section 277 [1](a) Criminal Procedure Act 51 of 1977

¹⁹⁰ Section 11[2] was amended by Section 12[1](e) Constitution of the Republic of South Africa Act 108 of 1996

¹⁹¹ *S v Makwanyane* supra (n186) at 150

¹⁹² *R v Smith* supra (n57)

¹⁹³ Section 12 Canadian Charter of Rights and Freedoms (Constitution Act of 1982, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, part 1)

¹⁹⁴ *S v Makwanyane* supra (n186) at 94

¹⁹⁵ *Ibid*

As we have seen, the application of constitutional rights in challenging sentencing law was first put forward in the context of capital punishment. However, in the year after *Makwanyane*,¹⁹⁶ the concept of proportionality, which the Constitutional Court defines as the balance between the sentence to be imposed and the fundamental rights involved, was applied in the context of minimum mandatory sentencing by a Namibian High Court.¹⁹⁷ The Namibian Court applied the same principle of proportionality in sentencing as had been developed and applied in the *Smith*¹⁹⁸ case in Canada. It held that it was unconstitutional to impose the prescribed mandatory sentence for the offence of stock theft, as that was not proportionate to the seriousness of the offence and provided an outcome that was ‘shocking’ in the circumstances. Here, again, the existence of a constitution and the rights that it entails have proved to be efficient tools to ensure the maintenance of the principle of proportionality in sentencing, safeguarded by respect for the fundamental rights of the accused.

The South African Constitution enacted in 1996 had the effect of reinforcing judicial primacy in sentencing, which was already established by a long line of scholarship. Following other jurisdictions, the Constitutional Court found in the Constitution a justification for the promotion of fundamental rights and for the reframing of certain principles of sentencing, such as proportionality. As a result, the first applications of the Constitution by the South African courts could have led to an expectation that mandatory minimum sentences were about to disappear from the South African sentencing scene. However, critics against judicial primacy rapidly emerged and public opinion became hostile towards disparities in sentencing. A remedy was sought in the creation of a legislative standard that would affect the exercise of the sentencing court’s discretion.¹⁹⁹ This resulted in the passage of Act 105 of 1997.²⁰⁰

¹⁹⁶ *S v Makwanyane* supra (n186)

¹⁹⁷ *S v De Vries* (2) 1996 SACR 639 Nm JC 661 f- 662c

¹⁹⁸ *R v Smith* supra (n57)

¹⁹⁹ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 25

²⁰⁰ Criminal Law Amendment Act 105 of 1997

CHAPTER 6

THE ACT 105 OF 1997: 'SUBSTANTIAL AND COMPELLING CIRCUMSTANCES'

6.1 The background to the Act and judicial dissatisfaction

The advent of a constitutional democracy in South Africa was in fact meant to define a new society, based on substantive equality.²⁰¹ Writing in the *South African Journal of Human Rights* in 1998, Albertyn and Goldblatt make the point that the movement of change will:

‘require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities, which allow people to realise their full human potential within positive social relationships.’²⁰²

Hence the transformation agenda operating in South Africa was a social and economic revolution, occurring in the context of a country having to contend with unequal and insufficient access to housing, food, water, healthcare and electricity.²⁰³ Despite the advent of a Constitution providing a new set of rights, equality is far from having been achieved and the societal revolution has left the country struggling with a high level of crime. As former Chief Justice Chaskalson has written: ‘[F]or as long as these conditions continue to exist that aspiration [that is, of substantive equality] will have a hollow ring.’²⁰⁴

To address this upsurge in crime, the introduction of new sentencing legislation was seen as necessary. On 1 May 1998, the *Criminal Law Amendment Act 105 of 1997*²⁰⁵ came into operation, re-introducing minimum sentencing in South Africa.

²⁰¹ Justice Pius Langa ‘Transformative Constitutionalism’ (9 October 2006) available at <http://sun025.sun.ac.za/portal/page/portal/law/index.afrikaans/nuus/2006/Pius%20Langa%20Speech.pdf>

²⁰² C Albertyn & B Goldblatt ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 *S.A.J.H.R.* 248

²⁰³ Justice Pius Langa op cit (n201)

²⁰⁴ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at 8

²⁰⁵ Criminal Law Amendment Act 105 of 1997 came into force by Proc R43 GG6175 of 1 May 1998, hereafter referred to as the Act

Some argue that the Act was designed to bring the law into line with the Constitutional Court's findings in *Makwanyane*²⁰⁶ and the rise in popular punitiveness, given that public sympathy was against the abolition of the death penalty.²⁰⁷ Indeed, the Van Den Heever Committee²⁰⁸ found that the need for new legislation responded in part to a call from the community for heavier penalties and for offenders to serve a more realistic term of imprisonment. Public dissatisfaction with the crime situation and sentencing was reflected in various newspaper reports.²⁰⁹

The South African Law Commission saw the introduction of the new Act as an effort to remedy increasing crime rates and decrease sentencing disparities. Basing its argument on the punishment objectives, the Commission encouraged the re-introduction of mandatory minimum sentencing for specified serious offences. Prior to 1997, punishment objectives primarily included deterrence, incapacitation, reformation and retribution.²¹⁰ However, in its 1997 report, the Commission found that while retributive notions²¹¹ of justice remained important, objectives such as deterrence, denunciation of blameworthy behaviour, redress of harm, and rehabilitation had begun to overshadow retributive concerns.²¹²

Consequently, besides the notion of retribution, deterrence and the need for consistency were suggested as possible purposes for the Act. Minimum sentence

²⁰⁶ *S v Makwanyane* supra (n186)

²⁰⁷ M O'Donovan & J Redpath op cit (n164) 11

²⁰⁸ South African Law Commission Discussion Paper 11 'Sentencing: Mandatory Minimum Sentencing' (1997)

²⁰⁹ "People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control." (*The Citizen* 26 October 1995); "Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse. ... We have told Mr. Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced." (*Sowetan* 10 November 1995); "We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it." (*Pretoria News* 26 October 1995); "'n Minimum vonnis en strawwer vonnisse kan vir kindermolesteerders ingestel word omdat huidige vonnisse nie 'n voldoende afskrikmiddel vir die gemeenskap blyk te wees nie. [A minimum sentence and tougher sentences could be introduced for child molesters, since existing sentences do not appear to be sufficient deterrent for the community.]" (*Beeld* 22 November 1995) in JJ Neser 'Mandatory Minimum Sentences in the South African context' (2001) 3 *Crime Research in South Africa* (CRSA) 2

²¹⁰ South African Law Commission op cit (n208) 24 (quoting *S v Khumalo* 1984 (3) SA (A) at 330 (S.Afr))

²¹¹ Retributive justice can be understood as a desert, proportionality-based sentencing theory. This theory 'ha[s] had the attraction that [it] purport[s] to be about *just* outcomes: the emphasis is on what the offender should fairly receive for his crime, rather than how his punishment might affect his future behaviour or that of others'. See A von Hirsch 'Proportionate Sentences: A Desert Perspective in A von Hirsch, A Ashworth and J Roberts (eds) *Principled Sentencing – Readings on Theory and Policy* 3ed (2009) 115

²¹² South African Law Commission op cit (n208) 23-27, 62

provisions have often been put forward as an effective deterrent. For instance, a study by Wicharaya²¹³ examined the effects of harsh sentencing policies across forty-five American states from 1959 to 1987. These policies generally fall into the category of ‘get tough on crime’²¹⁴ and include regimes such as mandatory minimum sentences. The premise of most of these reforms was to make prison sentences more certain or longer. Wicharaya noted that:

‘because they typically came into force as a result of high-profile political processes and appear – at least on the surface – to meet the criteria of increasing the perception that harsh sentences would flow from a conviction for one of the relevant offenses, they can be seen as forming a reasonable basis for expecting deterrence effects.’²¹⁵

The intention behind the South African legislation was no exception: the legislature’s aim in adopting the Act was to reduce the number of serious crimes through general deterrence. Judges endorsed this stance as illustrated in *S v Malgas*,²¹⁶ where the Supreme Court of Appeal declared: ‘In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such [serious] crimes...’

Another purpose of the Act, the need for consistency, originated from the fact that judges had a quasi-unfettered discretion to determine sentences, which led to blatant discrimination: ‘[L]ike cases [were] not being treated alike because there [was] unfair discrimination against some offenders on grounds of race and social status in particular.’²¹⁷ For example, sentences imposed by white judges on white accused were widely criticised in the media for being more lenient than those imposed on black accused, and open accusations of racial bias were made.²¹⁸

In due course, the first draft of the Act was formally tabled in Parliament on 9 June 1997, under the Criminal Law Amendment Bill.²¹⁹ Although it provided for the re-introduction of minimum sentences, the Bill innovated in setting up a system that

²¹³ T Wycharaya *Simply Theory, Hard Reality: The Impact of Sentencing Reforms on Courts, Prisons, and Crime* (1995) in AN Doob & CM Webster ‘Studies of the Impact of New Harsh Sentencing Regimes’ in A von Hirsch, A Ashworth and J Roberts (eds) (2009) *Principled Sentencing – Readings on Theory and Policy* 3ed (2009) 49

²¹⁴ T Wycharaya op cit (n213) at 49

²¹⁵ Ibid

²¹⁶ *S v Malgas* supra (n170) at 8

²¹⁷ South Africa Law Commission Discussion Paper 91 (Project 82) ‘Sentencing (A New Sentencing Framework)’ (2000) at 26

²¹⁸ van Zyl Smit op cit (n173) 202-203

²¹⁹ Criminal Law Amendment Bill (B46-97)

would allow judges to depart from the mandatory provisions. The Bill contained a provision allowing a court to impose lighter sentences than the prescribed minima if, in its opinion, there were ‘circumstances’ that would justify these lighter sentences.²²⁰ All the court was required to do was to record what these ‘circumstances’ were and that would, in theory, maintain the discretion of the sentencing court.

If the Bill had been adopted in its final version with a ‘circumstances’ clause, that would have safeguarded the judicial discretion of sentencing judges, which was, as we have seen, a sacred component of South African judicial history. However, Parliament reviewed the Bill, modified the exemption clause and imposed a greater burden on judges for departures from prescribed minima. This modification was made without the agreement of the judiciary, which never felt adequately consulted by the executive during the drafting of the Act as commented by Chief Justice Corbett in *S v Toms; S v Bruce*:

‘... the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce grave injustice.’²²¹

The final version of the Act of 1997 appeared harsher than its draft Bill. The changes that were made included: the introduction of a subsection that prescribes that mandatory minimum sentences cannot be suspended;²²² the extension of the list of offences for which minimum sentences would be imposed; and the addition of a mandatory life sentence for the most serious crimes.²²³ But one of the greatest changes involved new conditions that must be met before a court can depart from prescribed minima. From simply ‘circumstances’ that judges needed to record under the Bill, the Act now requires the finding of ‘substantial and compelling circumstances’²²⁴ before a departure can be allowed. The legislative history of these words ‘substantial and compelling’, which are not usual juridical terms in South Africa, is somewhat

²²⁰ Section 52 [3] Bill B46-97

²²¹ *S v Toms; S v Bruce* 1990 2 SA 802 [A] para 817 C-D

²²² Section 51[5] Criminal Law Amendment Act 105 of 1997

²²³ Section 51[1] Criminal Law Amendment Act 105 of 1997

²²⁴ Section 51[3] (a) Criminal Law Amendment Act 105 of 1997

obscure²²⁵ and has left courts with interpretation problems and inconsistencies in the application of the clause.

The core of mandatory minimum sentencing is laid out in s51 and Part 1 of Schedule 2 of the Act.²²⁶ As the re-introduction of mandatory minima was seen as an emergency measure that would apply for a period of two years, there was common accord that the uncertainties regarding some of these provisions, such as the ‘substantial and compelling circumstances’, did not need to be dealt with immediately. Although the Act came into force on 1 May 1998, it took some time for the effects of mandatory penalties to be felt, as they only applied to crimes committed after that date.²²⁷ There was a delay before the various divisions of the High Court were called upon to interpret the provisions of the Act, and a further delay in the reporting of relevant judgments.²²⁸ By the second half of 1999 judgments started to appear regularly in the law reports.

Between 1998 and 2001, Parliament kept extending the term of the Act without providing any further legislative guidance, leaving the courts with disparate interpretations and applications of the exemption clause.²²⁹ It was only in 2001 that the Supreme Court of Appeal (SCA) examined the issue and provided some guidance regarding the interpretation of ‘substantial and compelling circumstances’.

²²⁵ van Zyl Smit op cit (n173) 205

²²⁶ Often referred to as the ‘Minimum sentences Act’

²²⁷ *S v Willemse* 1999 (1) SACR 450 (C)

²²⁸ South Africa Law Commission op cit (n217) 10-11

²²⁹ Section 51[3](a) Criminal Law Amendment Act 105 of 1997

6.2 ‘Substantial and compelling circumstances’: guidance from the Supreme Court of Appeal

*R v Malgas*²³⁰ was a benchmark judgment in the interpretation of the exception clause and the effort to address the ‘judicial hostility to legislative prescriptions which strip courts of their sentencing discretion’.²³¹ In this instance, the appellant, a 22-year-old woman, was convicted of murder by the High Court and sentenced to imprisonment for life.²³² The Supreme Court of Appeal stressed that ‘the specified sentences should not be departed from lightly’²³³ and that prescribed sentences should ordinarily be imposed. Nonetheless, the ‘substantial and compelling circumstances’ clause allows judges to depart from the Act if they are convinced that the prescribed sentence would be disproportionate or amount to an injustice.²³⁴ In order to determine if a departure is called for, the Supreme Court of Appeal expressly rejected earlier decisions which ruled that individual circumstances must each be substantial and compelling. Instead, the Court stated that courts should weight up the cumulative impact of all the factors which would traditionally be relevant to sentencing.²³⁵

The conclusions in *Malgas*²³⁶ were reiterated in a recent decision, in which it was found that ‘courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them’.²³⁷ In *Matyityi*,²³⁸ three accused were indicted on one charge each of murder and rape and two charges of robbery for separate events that had occurred in April 2008.²³⁹ At the commencement of the trial before the Eastern Cape High Court, Matyityi, unlike his co-accused, expressed a willingness to tender a plea of guilty to all of the charges. After the trials he was separately convicted on his guilty plea. He was sentenced to 25 years’ imprisonment on each of the murder and rape charges, and to 13 years’ imprisonment in respect of each of the robbery counts, to run concurrently with the first sentence.²⁴⁰

²³⁰ *S v Malgas* supra (n170)

²³¹ *S v Malgas* supra (n170) at 1

²³² *S v Malgas* supra (n170) at 26-27

²³³ *S v Malgas* supra (n170) at 9

²³⁴ *S v Malgas* supra (n170) at 22

²³⁵ *S v Malgas* supra (n170) at 9

²³⁶ *S v Malgas* supra (n170)

²³⁷ *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) 23

²³⁸ *S v Matyityi* supra (n237)

²³⁹ *S v Matyityi* supra (n237) at 1 - 7

²⁴⁰ *S v Matyityi* supra (n237) at 7

In the first instance, Matiwana AJ identified 'substantial and compelling circumstances' to justify a departure from the prescribed sentences of life imprisonment laid down by the legislature for each of the murder and rape convictions.²⁴¹ The judge concluded: 'As I have stated, in my mind, the court should not impose the prescribed minimum sentence in [this] case, in view of the accused's age, and in the light of the remorse displayed by him during the trial here.'²⁴²

During the appeal against this sentence by the Director of Public Prosecutions, the Supreme Court of Appeal emphasised that public interest that should not be forsaken for the personal characteristics of the accused when issuing a sentence. Examining the evidence of remorse and the age of the accused as 'substantial and compelling circumstances', the Court found that these factors were not sufficient to justify a departure from the statutory penalties and concluded that: 'Being so motivated, it would seem that [the judge] overemphasised the interests of the respondent at the expense of the public interest in a just and proportionally balanced sentence'.

Yet the Supreme Court of Appeal underlines that the principle of public interest, which is a component that judges must take into account in determining of an appropriate sentence, is a criterion that should also be taken into account in the assessment of 'substantial and compelling circumstances'. No better definition or guidance of public interest had been developed by the courts than the one left by the triad²⁴³ which suggested that, on the one hand, there were society's interests and, on the other, the offender's interests. Although it could be argued that society's interests are reconcilable with the interests of the accused, as the High Court would itself do at a later date,²⁴⁴ the Supreme Court of Appeal in *Matyityi*²⁴⁵ was simply relying on the sentencing guidelines set out by precedents to offer more guidance on the application of the exemption clause.

Since it entered into force, the interpretation and application of the Act, and specifically of its s51(1), have led to inconsistencies. The Supreme Court of Appeal has offered the guidance that the prescribed sentence should normally be imposed, but the law allows a departure from it when it would be disproportionate to the crime or

²⁴¹ *S v Matyityi* supra (n237) at 9

²⁴² Ibid

²⁴³ *S v Zinn* supra (n166) at 540G

²⁴⁴ *S v Maluleke and others* 2008 1 SACR 49 (T) 19-20

²⁴⁵ *S v Matyityi* supra (n237)

amount to an injustice. The Court further established that it is the cumulative effect of all the factors normally taken into consideration in the sentencing process that serve to determine ‘substantial and compelling circumstances’ and that consideration of the public interest is key to a just and proportionally balanced sentence. However, this provides very little guidance and many problems remain. The Act was an attempt to introduce a measure of conformity into the sentencing process and should not have been regarded as introducing a major change in the approach to sentencing.²⁴⁶ If the ‘substantial and compelling circumstances’ clause safeguarded the constitutionality of the Act when challenged before the Constitutional Court, this has not prevented the courts from using it as grounds for deviating from the imposition of mandatory minimum sentences.²⁴⁷

6.3 Courts’ interpretations of the vagueness of the law

If the exception clause has been criticised due to its lack of guidance and precision, it is this very vagueness regarding which circumstances would allow a judge to depart from the minimum sentences which has maintained the validity of the Act when it has been constitutionally challenged. Constitutional issues regarding the Act have been raised twice, and in both cases the Constitutional Court (CC) decided not to confirm the order of invalidity made by high courts. In the first case, the question before of the court did not concern the exception clause, but rather the split procedure created by s52 of the Act.²⁴⁸ In the second case, the Act’s validity was constitutionally challenged on two grounds. First, the High Court found that the imposition of a prescribed sentence was a limitation of the fair trial envisaged by s35(3)(c) of the Constitution, which guaranteed every person ‘a public trial before an ordinary court’. The Constitutional Court did not endorse this argument and rather concluded that both the Legislature and the Executive had a legitimate interest, role and duty with regard to the imposition and subsequent administration of penal sentences.²⁴⁹ The existence of an exception clause permitting the imposition of a lesser sentence than the one prescribed ensured that the ‘separation of powers’ principle was not infringed.

²⁴⁶ South Africa Law Commission op cit (n217) 12

²⁴⁷ South Africa Law Commission op cit (n217) 10-19

²⁴⁸ According to s52 an accused convicted by the Regional Court had to be sentenced by the High Court for the commission of certain crimes. See *S v Dzukuda*; *S v Tilly*; *S v Tshilo* 2000 (3) SA 229 (W)

²⁴⁹ *S v Dodo* 2001 (3) SA 382 (CC) 33

Therefore the Act did not transgress the Bill of Rights' check on the Legislature, does not infringe the separation of powers principle and preserves the accused's right to a fair trial.²⁵⁰

The second argument put forward was that the imposition of the prescribed minimum sentence constituted a violation of the fundamental right to not be subject to cruel, inhuman or degrading punishment under s12(1)(e) of the Constitution. In its decision, the Constitutional Court concurred with the opinion of the Supreme Court of Canada in *Smith*²⁵¹ and *Latimer*,²⁵² and recognised that gross disproportionality between the sentence and the crime for which it is imposed could constitute a violation of this right:

'In Canada the issue is dealt with on the basis of whether the statutory provision enacting the mandatory minimum sentence unjustifiably infringes the right guaranteed by section 12 of the Canadian Charter of Rights and Freedoms "not to be subjected to any cruel and unusual treatment or punishment."⁴³¹ The criterion which is applied to determine whether a mandatory minimum punishment is cruel and unusual is "whether the punishment prescribed is so excessive as to outrage standards of decency;" the "effect of that punishment must not be grossly disproportionate to what would have been appropriate."⁴⁴²⁵³

However, the Constitutional Court found that the exemption clause included in the Act was a legislative safeguard that will ensure that the right of an offender under s12(1)(e) of the Constitution will not be infringed:

'The whole approach enunciated in *Malgas*, and in particular the determinative test articulated in paragraph I of the summary, namely [...] makes plain that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross. Thus the sentencing court is not obliged to impose a sentence which would limit the offender's section 12(1)(e) right. Accordingly section 51(1) does not compel the court to act inconsistently with the Constitution.'²⁵⁴

The Constitutional Court not only referred to *Malgas*²⁵⁵ as constituting the 'determinative test' for departure from the prescribed sentence, but also stated that it is this 'test', or the possibility for courts to apply 'substantial and compelling circumstances', that maintains the constitutional validity of the Act. Even though the

²⁵⁰ *S v Dodo* supra (n249) at 40

²⁵¹ *R v Smith* supra (n57)

²⁵² *R v Latimer* supra (n72)

²⁵³ *S v Dodo* supra (n249) at 30

²⁵⁴ *S v Dodo* supra (n249) at 40

²⁵⁵ *S v Malgas* supra (n170)

Court found that the exemption clause would ensure that no ‘grossly disproportionate’ sentence would be applied, it has not provided more specific guidance or determined any criteria for identifying what constitutes ‘substantial and compelling circumstances’. Hence the interpretation of the exemption clause is still largely in the hands of sentencing courts, which have decided that the exception should become the rule in the case of rape.

In the wake of the Constitutional Court’s decision in *Dodo*²⁵⁶ and the Supreme Court of appeal’s decision in *Malgas*,²⁵⁷ courts have constructed a hybrid sentencing scheme²⁵⁸ for departures from the legislative-prescribed sentences. This hybrid scheme aims at compliance with the two afore-mentioned appellate decisions. The result is a lesser sentence for the accused based on factors related to the gravity of the crime as opposed to the offender or victim. In the long-term, this has created a sentencing scheme that misuses valid reasons for a departure from the mandatory minimums and has allowed the development of a rape jurisprudence that minimises the inherent violence of rape.

Thus, in the case of rape, the Supreme Court of Appeal has established a new benchmark,²⁵⁹ to which the imposition of the prescribed sentences is an exception. The minimum sentences Act prescribes the imposition of life imprisonment when the offence of rape is repeated more than once.²⁶⁰ Under s51(3)(aA), the Act also provides particular guidance: ‘[W]hen imposing a sentence in respect of the offence of rape [the following] shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence.’²⁶¹

In the case *S v Mahomotsa*,²⁶² even with this legislative specification and the presence of specified aggravating factors, the Supreme Court of Appeal departed from the imposition of the ultimate sentence provided for by the Act. In convicting the accused, the regional magistrate found as a fact that he had had non-consensual sex with each

²⁵⁶ *S v Dodo* supra (n249)

²⁵⁷ *S v Malgas* supra (n170)

²⁵⁸ NJ Kubista “‘Substantial and compelling circumstances’: Sentencing of rapists under the mandatory minimum sentencing scheme’ (2005) 18 *S.Afr. J. Crim. Just.* 81

²⁵⁹ *S v Mahomotsa* 2002 (2) SACR 435 (SCA) and *S v Abrahams* supra (n199)

²⁶⁰ Section 51[1] Criminal Law Amendment Act 105 of 1997

²⁶¹ Section 51[3](aA) Criminal Law Amendment Act 105 of 1997 – these factors are: (i) The complainant’s previous sexual history; (ii) an apparent lack of physical injury to the complainant; (iii) an accused person’s cultural or religious beliefs about rape; or (iv) any relationship between the accused person and the complainant

²⁶² *S v Mahomotsa* supra (n259)

of the two complainants more than once.²⁶³ Referred to the High Court, the accused was sentenced to six years' imprisonment on the first and ten years' imprisonment on the second count, with these sentences running concurrently.²⁶⁴ In imposing the sentence, Kotze J considered the mitigating and aggravating features in the case. These were, according to him:

'that the accused was relatively young and had already spent eight months in prison at the time of sentencing; that the complainants sustained no physical injuries and had suffered no psychological damage as a result of the rapes, and that they had not lost their virginity from the rapes as they had already been sexually active, one of them having had sexual intercourse two days before she was raped by the accused. The aggravating features were that the accused had a relevant previous conviction of having had sexual intercourse, in 1994, with a girl of less than 16 years of age and for which he was sentenced to five strokes with a light cane; that he committed the second offence while he was awaiting trial on the first count – he had been released in the custody of his grandmother – and that he had lied about his age in court (he had said that he was 17 years old while he was in fact 23) in order to secure a light sentence.'²⁶⁵

At appeal, the Supreme Court of Appeal reviewed these factors to conclude that the court *a quo* misdirected itself in its assessment of substantial and compelling circumstances.²⁶⁶ Nonetheless, the Court concluded that the prescribed sentence of life imprisonment should not be imposed in this instance. It relied on two tests to justify its decision. First, the Court established that the rapes concerned, though serious, 'cannot be classified as falling within the worst category of rape'²⁶⁷. Hence, based on a logic of proportionality, the Court explained that:

'One must of course guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, none the less all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.'²⁶⁸

²⁶³ *S v Mahomotsa* supra (n259) at 1

²⁶⁴ *S v Mahomotsa* supra (n259) at 2

²⁶⁵ *S v Mahomotsa* supra (n259) at 10

²⁶⁶ The Supreme Court of Appeal especially disagree with the finding that no physical injury or psychological damage was done, and that 'a man's virility, irrespective of his age, can never be a mitigating factor when he chooses to satisfy his lust by sexually violating a woman against her will.' See *S v Mahomotsa* supra (n259) at 11-13

²⁶⁷ *S v Mahomotsa* supra (n259) at 17

²⁶⁸ *S v Mahomotsa* supra (n259) at 19

Secondly, taking into account the mitigating factors related to the first count, the Court found that the prescribed life imprisonment ‘would be disproportionate to the crime, the criminal and the legitimate interests of society [...]’.²⁶⁹ What is interesting to note is that even though the Court determined that ‘the same cannot be said without more about the second count’,²⁷⁰ it pointed out that it was unable to alter the legislation on which it had to base its decision:

‘[A]t the time of the second rape, the accused had not as yet been convicted on the first count. Again this is of course no excuse. But the Legislature has itself distinguished him from persons who, having been convicted of two or more offences of rape but not yet sentenced, commits yet another rape. If, for example, the accused in the first instance had not raped the first complainant more than once and he then in the second instance raped the second complainant only once while awaiting trial on the first count the prescribed sentence of life imprisonment would not have come into the reckoning.’²⁷¹

Consequently, the Supreme Court of Appeal imposed a revised sentence of eight years’ imprisonment on the first count and 12 years’ imprisonment on the second count, to be served cumulatively.²⁷²

To decide on the appropriate sentence to be imposed in the case of *Mahomotsa*,²⁷³ the Court referred to the decision that it had made the same year in *Abrahams*²⁷⁴ where, on the appeal by the State against a seven-year sentence, the Supreme Court of Appeal increased the sentence of a father convicted for the rape of his 14-year-old daughter to 12 years’ imprisonment. This decision has had a significant impact on the interpretation of the minimum sentences Act. The Court referred to the Sentencing Act as ‘a legislative standard that weighs upon the exercise of the sentencing court’s discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.’²⁷⁵ However, although the Court found that the sentence imposed by the court *a quo* was too lenient, it refused to impose the sentence of life imprisonment prescribed by the Sentencing Act.

²⁶⁹ *S v Mahomotsa* supra (n259) at 20. The Court referred to ‘factors mentioned in para 17 above, taken together with the accused’s relative youth and his other personal circumstances, the fact that his previous conviction, though of a sexual nature, did not involve non-consensual sex.’

²⁷⁰ The accused was charged on the second count after he had been arrested on the first count, appeared in court and was released in the custody of his grandmother when committing a similar offence.

²⁷¹ *S v Mahomotsa* supra (n259) at 20.

²⁷² *S v Mahomotsa* supra (n259) at 27

²⁷³ *S v Mahomotsa* supra (n259)

²⁷⁴ *S v Mahomotsa* supra (n259) at 25 which referred to *S v Abrahams* supra (n199)

²⁷⁵ *S v Abrahams* supra (n199) at 25

The Supreme Court of Appeal recognised that, when a court is asked to determine an appropriate sentence, ‘due regard must [therefore] be paid to what the Legislature has set as the ‘benchmark’, even when substantial and compelling circumstances are found to exist’.²⁷⁶ Nevertheless, a sentence should always be imposed in accordance with the principles enunciated by the Constitutional Court,²⁷⁷ which ensure that courts will not impose disproportionate and unjust sentences, even if prescribed by the legislature. Once again, the Supreme Court of Appeal applied the logic of proportionality to conclude that the ‘worst sentence’ should be reserved for the ‘worst crime’:

‘But it does weigh further toward the conclusion that a sentence of life imprisonment would be unjust. In addition, I agree with Foxcroft J that this is not one of the worst cases of rape. This is not to say that rape can ever be condoned. But some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.’²⁷⁸

Since these decisions from the Supreme Court of Appeal, the application of ‘substantial and compelling circumstances’ in the case of rape is no longer the exception, but the norm. The sentence of life imprisonment laid down in the Act is now reserved for the ‘worst cases of rape’, which result in the prescribed sentences not normally being imposed.²⁷⁹ Even when a case involves specified factors enunciated in the Act as not constituting substantial and compelling circumstances,²⁸⁰ the Supreme Court of Appeal still refuses to impose the prescribed sentence if it concludes that the given rape is not ‘the worst’ there is.²⁸¹

Thus, if the Supreme Court of Appeal previously established that a slight discrepancy between a prescribed minimum sentence and what would constitute a ‘proportionate’ sentence was not enough to justify a departure, it is still not clear how much more it takes to reach this ‘justification’. In the case of rape, for example, this justification is easily found when the crime is not ‘one of the worst cases of rape’. According to the Constitutional Court, the fact that the exemption clause makes it possible to not impose a prescribed minimum sentence ensures that the Act will not infringe an

²⁷⁶ *S v Abrahams* supra (n199) at 26

²⁷⁷ *S v Dodo* supra (n249)

²⁷⁸ *S v Abrahams* supra (n199) at 27

²⁷⁹ S Terblanche ‘Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997’ University of South Africa (2005) at <http://www.unisa.ac.za/contents/faculties/law/docs/Mandatory%20and%20Minimum%20Sentences.pdf>

²⁸⁰ Section 51[3](aA) Criminal Law Amendment Act 105 of 1997

²⁸¹ *Ndou v S* (93/12) [2012] ZASCA 148 para 16

accused's fundamental rights. However, the same clause leads to the imposition of incoherent sentences for similar cases, and could therefore equally be seen as detrimental to an accused's rights.²⁸² Moreover, the fact that the Supreme Court of Appeal ruled against the imposition of mandatory life imprisonment in the case of repeated rape despite the fact that such a sentence is provided for in the Act highlights the weakness of the Act and raises serious doubts on its merits.

In theory, the Act was meant to provide a strict sentencing scheme that would protect South African citizens and values.²⁸³ In practice, it appears that the Act of 1997 has not achieved its goals.

²⁸² For instance, the Right to a fair and equitable trial, or the Right to a complete defence.

²⁸³ Section 51 Criminal Law Amendment Act 105 of 1997

CHAPTER 7

LESSONS TO BE LEARNED

7.1 Pitfalls of mandatory minimum sentences in South Africa

In 2007, Parliament introduced the Criminal Law Sentencing Amendment Bill,²⁸⁴ which attempted to address some of the unintended consequences of the Act. Amongst other changes, it removed s53, so that the President no longer needs to reconsider extending the legislation on a bi-annual basis.²⁸⁵ The removal of the sunset clause therefore means that the Act is now permanent and remains in force indefinitely. Although some people argue that the government is still committed to restructuring and transforming sentencing, and that these moves should not be seen as a decision to make minimum sentences a permanent feature of the criminal justice system,²⁸⁶ the 2007 Bill has not undergone substantial legislative change. To date, the mandatory minimum sentencing regime in place has as yet failed to adequately address sentencing problems in South Africa satisfactorily and the Act does not appear to provide a sustainable future for sentencing development.²⁸⁷

One of the first issues of the general sentencing regime established by the Act illustrates the fact it has not met its goals and purposes. Roth²⁸⁸ suggests that this failure should be attributed to the Parliament, which did not adequately consider the proposals set forth by the South African Reform Commission in its Issue Paper 11.²⁸⁹ By not addressing these recommendations, as it should have done, Parliament has created a sentencing regime that does not further the expressed aims of South African punishment or address the sentencing disparities which had originally prompted the Act.²⁹⁰ Roth bases his argument on research²⁹¹ examining the effects of the Act, and suggests that s51's mandatory minimums have not achieved South Africa's sentencing goals. His findings demonstrate that crime has risen, and not declined, since the

²⁸⁴ The Bill was enacted under the Criminal Law (Sentencing) Amendment Act 38 of 2007

²⁸⁵ S Terblanche 'Research on the Sentencing Framework Bill – Report 4' *Open Society Foundation for South Africa* (2008) 7-8

²⁸⁶ Terblanche op cit (n285) 8

²⁸⁷ Ibid

²⁸⁸ SM Roth 'South African Mandatory Minimum Sentencing: Reform Required' (2008) *Minnesota Journal of International Law* 165

²⁸⁹ See South African Law Commission op cit (n208)

²⁹⁰ Roth op cit (n288) 163

²⁹¹ See, for example, J Berg & W Schärf 'Crime Statistics in South Africa 1994-2003' (1994) 17 *S.AFR.J OF CRIM.* 57 in Roth op cit (n288) 164 n57

introduction of this legislation;²⁹² sentencing inconsistency still pervades the South African judicial system;²⁹³ and satisfaction with the criminal justice system remains low.²⁹⁴

Terblanche²⁹⁵ shares the view that the Act of 1997 has not met any of its purposes. He bases his argument on the Viljoen Commission's conclusion, highlighting that 'minimum sentences gave no room for the balancing effect of retribution, that these sentences increased the prison population substantially, and yet produced no observable reduction in crime rates.'²⁹⁶ One of his main criticisms is that the *Criminal Law Amendment Act*²⁹⁷ does not result in retribution, as understood in the sense of 'just deserts' or 'proportionality'.²⁹⁸ He illustrates his point with the example of rape as described above and the new benchmark established by the Supreme Court of Appeal²⁹⁹ for this category of crime. The Court, calling for prescribed minima as an exception reserved for the worst cases of repeat-offence rape, proposes an interpretation coherent with the retributive theory.³⁰⁰ However, as we have seen, this interpretation does not follow the legislator's intention behind the Act and therefore highlights the incongruence between the Act and the retributive theory.

Another difficulty with the Act of 1997 was the procedural aspect. The Act defined the respective jurisdictions of the High Court and Regional Court regarding its application.³⁰¹ The requirement that all murder and rape cases that fell within the ambit of s51(1) had to be committed to the High Court, as the only court that can impose life imprisonment,³⁰² meant that the High Court had to review the transcription of all trials before the Regional Court can impose a sentence for a case conducted in

²⁹² J Sloth-Nielsen & L Ehlers 'A Pyrrhic Victory?: Mandatory and Minimum Sentences in South Africa' (2005) in Roth op cit (n288) 164 n58

²⁹³ J Sloth-Nielsen & L Ehlers 'A Pyrrhic Victory?: Mandatory and Minimum Sentences in South Africa' (2005) in Roth op cit (n288) 164 n59

²⁹⁴ South Africa Law Commission op cit (n217) xviii-xx

²⁹⁵ Terblanche op cit (n285) 4

²⁹⁶ *Report of the commission of inquiry into the penal system of the Republic of South Africa* (1976) RP 78/76 para 5.1.4.1, 5.1.4.7 in Terblanche op cit (n285) 4

²⁹⁷ Criminal Law (Sentencing) Amendment Act 38 of 2007

²⁹⁸ Terblanche op cit (n285) 4

²⁹⁹ *S v Mahomotsa* supra (n259), *S v Abrahams* supra (n199), *Ndou v S* supra (n281)

³⁰⁰ The retributive theory holds that punishment is justified by the moral requirement that the guilty make amends for the harm they have caused to society. See A Ashworth 'Structuring sentencing discretion' and 'Four techniques for reducing sentence disparity' in A von Hirsch and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* 2ed (1998) 222

³⁰¹ Section 51[1] Criminal Law Amendment Act 105 of 1997

³⁰² Terblanche op cit (n285) 5

front of this instance, as it had to be satisfied that the conviction was regular before it could find the accused guilty again.³⁰³ Due to this jurisdiction restriction for the application of the Act, High Courts were soon completely overloaded. However, the Amendment Act of 2007 has addressed this issue and simplified the procedure which had given rise to a massive increase in the number of sentences that had to be imposed in the High Courts. In this amended version, the Act has 'repeal[ed] all sections dealing with the committal of an accused for the purposes of sentencing by a High Court after conviction in a regional court of an offence referred to in Schedule 2.'³⁰⁴

Despite the fact that this amendment has facilitated proceedings before the High Court, the mandatory minimum sentencing regime remains problematic as it entails increasingly cumbersome and costly procedures in the courts. Lengthy detentions and trials mean that justice is delayed, to the extent that questions of constitutionality will continue to arise in a context of generally worsening prison conditions.³⁰⁵ Beyond the procedural difficulties of the Act, a major issue remains within its core disposition.

7.2 An exemption clause that leads to consistencies

On a more specific level, criticisms have been levelled against the 'substantial and compelling' clause. Terblanche³⁰⁶ shares the opinion that the Act had little chance of achieving greater consistency in sentencing. If the intention behind the introduction of prescribed minima was to avoid disparities in sentencing, the exemption clause which allows for departure should have provided more guidance for judges. But the 'substantial and compelling circumstances' are ill-defined and leave too much leeway for interpretation. The courts' practice has therefore resulted in the misuse of the subjectivity severity of the crime as a mitigating factor.³⁰⁷ As courts continue to create case law based on subverting legislation, a wealth of unintended consequences have arisen when applying 'substantial and compelling circumstances'. Consequently, the exemption clause fails to offer proper remedy to disparities, despite the parameters elaborated by the Supreme Court of Appeal in 2001.³⁰⁸ With the Court's new

³⁰³ Section 52 Criminal Law Amendment Act 105 of 1997

³⁰⁴ Preamble of the Criminal Law (Sentencing) Amendment Act 38 of 2007

³⁰⁵ O'Donovan & Redpath op cit (n164) 84

³⁰⁶ Terblanche op cit (n285) 4

³⁰⁷ Kubista op cit (n258) 77

³⁰⁸ *S v Malgas* supra (n170)

guidance, the test to depart from prescribed minima is similar to the one elaborated by the Supreme Court of Canada³⁰⁹ which is, in theory, difficult to meet. However, even these parameters have not proven to provide sufficient consistency, which remain a problem for the application of prescribed penalties.

Ironically, it is because the courts have been defending the exemption clause as a way to ‘apply the legislation in a constitutional manner’³¹⁰ that the Act has survived constitutional challenge. However, as described under section 6.3 of this paper, the courts’ application actually diverts the Act from Parliament’s original intention. This dichotomy between, on the one hand, the Act and the Parliament intention for it and, on the other, the courts arguing constitutional rights to promote their judicial independence, is far from encouraging consistency within the South African sentencing regime.

Finally, the burden that the Act imposes on judges to justify ‘substantial and compelling circumstances’ for departure from prescribed sentences can negatively influence the public opinion. It also reflects how the legislation has placed the judiciary at a disadvantage. Van Zyl Smit³¹¹ illustrates this point with the case of *S v Jansen*³¹² and the public criticism to which it has given rise. In this case, the accused, aged 26, was convicted of raping a 9-year-old girl on the state’s acceptance of his plea of guilty. Judge Davis found ‘substantial and compelling’ reasons to impose a sentence of eighteen years’ imprisonment instead of the prescribed mandatory life sentence. This sentence, which represented a heavy sentence³¹³ by the standards that applied prior to the enactment of the Act, was subject to severe public criticism.³¹⁴ Van Zyl Smit argues that prior to the Act, a sentence of eighteen years’ imprisonment in a case like this would have drawn widespread public approval. However, to impose the same sentence under the new legislation, judges have to explain why the crime is less serious in relative terms. *S v Jansen* was rendered in 1999, not long after the adoption of the Act. Since then, we have seen that departures from the prescribed sentence have become common practice in cases of rape. However, the same problem

³⁰⁹ *R v Smith* supra (n57)

³¹⁰ Terblanche op cit (n285) 5

³¹¹ van Zyl Smit op cit (n173) 207

³¹² *S v Jansen* 1999 [2] SACR 368 [C]

³¹³ van Zyl Smit op cit (n173) 207

³¹⁴ See, for example, Cape Times, 23 June 1999; Cape Times, 30 June 1999 in van Zyl Smit supra (n173)

is encountered each time that judges consider that a departure from statutory minima is required in the circumstances: they have to justify why the crime at the bar is relatively less serious. In doing so, the risk is that the public will perceive them as being soft on crime, a perception which the political proponents of mandatory sentences can use to further their argument that such prescribed sentences are necessary because judges are too lenient and out of touch.³¹⁵

7.3 Judicial legacy, legal cultures and socio-political values

One of the main arguments put forward to promote the introduction of mandatory penalties in both the Canadian and the South African jurisdictions has been the need to provide greater consistency in sentencing. In the case of South Africa, disparities were mainly due to race and social cleavage. Critics denounced the fact that, in court, ‘cases were not being treated alike because there was unfair discrimination against some offenders on grounds of race and social status in particular’.³¹⁶

In Canada, the need for consistency was mainly attributed to the construction of the judiciary system itself, which led to a lack of standardisation at a national level. The latitude given to sentencing judges means that different sentences exist across provinces for similar offences. Until 1996, the only legislation governing sentences was to be found in the penalty sections of each of the 350 or so offences described in the criminal code.³¹⁷ The only guidance available on how to sentence when a specific offence did not provide for a minimum or maximum penalty, or even if it did, on how to determine the appropriate sentence in between, was from the Courts of Appeal in each province. The introduction of the sentencing purposes and principles into legislation in 1996³¹⁸ was meant to provide more congruency but, as we have seen under section 3.1, the little guidance offered by this codification had in reality very little impact on court’s sentencing practices. Unfortunately, the situation cannot be rectified by appealing to higher courts since, at the national level, sentence disparities due to the courts’ application of different standards across the country do not constitute a sufficient reason for a leave of appeal to be granted by the Supreme Court

³¹⁵ van Zyl Smit op cit (n173) 210

³¹⁶ South Africa Law Commission op cit (n217) 26

³¹⁷ Doob op cit (n36) 240

³¹⁸ Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

of Canada. In fact, the highest court does not hear appeals against sentences unless there is an issue of national interest that the court believes needs to be resolved.³¹⁹

Disparity in sentencing was hence a common issue in both jurisdictions, even if due to different considerations. In order to address this matter, both legislatures have chosen to introduce mandatory minima as a means to decrease sentencing disparities over other remedies.³²⁰

Despite the fact that Canada and South Africa share a common legacy of strong judicial discretion, the two countries have major historical, social and cultural differences, which cannot help but have an influence on their current judicial systems. Indeed, it is said that ‘in attempting to understand the impact of judicial politics and attitudes, it is necessary to place courts’ decisions in the context of the different circumstances, “legal cultures” and “socio-political values” that exist in a particular society’.³²¹

On the one hand, Canada is described as a stable and developed country. It has been a democracy since its beginnings as a country, in 1867. Respect of human rights is a principle that has been established for decades and Canada is perceived as a precursor in this field, being party to many multilateral and international human rights treaties.³²² Capital punishment, for example, was abolished from the Canadian Criminal Code in 1976 by Bill C-84.³²³ The abolition of the death penalty was a significant development in the advancement of human rights. Everyone's right to life was subsequently enshrined in s7 of the *Canadian Charter of Rights and Freedoms*.³²⁴

In this context, the Supreme Court of Canada's rejection of judicial authority when asked to promote the rights of an accused³²⁵ is surprising. The best years of the Charter seem to be over as the Court now favours constitutional minimalism when it

³¹⁹ Section 40 [1] Supreme Court Act, R.S.C., 1985, c. S-26

³²⁰ Such as improving the definition of their legislative framework or providing greater guidance with the adoption of sentencing guidelines.

³²¹ J Sarkin ‘The Political Role of the South African Constitutional Court’ (1997) 114 *S. African L.J.* 137

³²² See Canadian Heritage ‘Canada and International Human Rights’ available at <http://www.pch.gc.ca/pgm/pdp-hrp/inter/index-eng.cfm>

³²³ An Act to Amend the Immigration Act, 1976, and the Criminal Code in Consequence Thereof [Bill C-84], 35-36-37 Elizabeth II, 1988, c.36

³²⁴ The Constitution Act of 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, part 1

³²⁵ For example, to determine whether a mandatory sentence is grossly disproportionate to what would otherwise be an appropriate and fit sentence.

has to decide between law enforcement and the promotion of constitutional rights. The shifts in both constitutional law and sentencing practices have changed the Court's position, reducing judicial power to the benefit of executive power.

On the other hand, the South African experience has occurred in a totally different context. The country had to wait until 1996 to see the abolition of capital punishment,³²⁶ which followed shortly after the advent of democracy and the adoption of a Bill of rights.³²⁷ That was some ten years after the Canadian experience. In reality, the legacy of apartheid - poverty, abuse and inequalities - has placed the country far behind Canada, as the situation remains precarious today. South Africa is far from knowing Canada's stability, and there is an ongoing struggle over questions of human rights.

As explained under section 5.1 of this paper, the change from parliamentary to constitutional supremacy is probably the most critical shift that occurred during the transition to democracy in South Africa. The effect of parliamentary supremacy was to ensure that judges were mere technicians who could not mitigate the effects of unjust laws only on procedural and technical grounds.³²⁸ However, the introduction of a new Constitution and Bill of Rights has seen the courts in South Africa being used as an alternative to the democratic process of changing law in Parliament.³²⁹ The establishment of the Constitutional Court contributed greatly to this end. In effect, it is suggested that constitutional interpretation can differ fundamentally from the interpretation of statutes and this can give the courts the opportunity to shape the society in which they are located.³³⁰ In return, the weighing of constitutional values is influenced not only by the personal values to which the adjudicating judges subscribe, but also to some degree by the norms and values of the legal and wider communities in which they live.³³¹

In an article about the political role of the South African Constitutional Court, Sarkin suggests that:

³²⁶ *S v Makwanyane* supra (n186)

³²⁷ Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996

³²⁸ Sarkin op cit (n321) 134

³²⁹ Ibid

³³⁰ T Vallinder 'The judicialization of Politics: Meaning, Forms, Background, Prospects' (1992) *Acta Societatis Juridicae Lundensis* 267 in Sarkin op cit (n321) 136

³³¹ Sarkin op cit (n321) 137

‘the most important factor determining interpretation is the composition of the adjudicating court, as the orientation of individual judges has profound effect on their interpretation of such issues as which right to give superior weight to and how various rights ought to be balanced. Who the judges are and the manner in which they are appointed is highly relevant to the outcome of a decision.’³³²

This fact is highly relevant and provides a probable explanation for the turn in the Supreme Court of Canada’s decisions in recent years.

7.4 Political influence

The Supreme Court of Canada consists of the Chief Justice of Canada and eight judges appointed by the Governor General of Canada, the Monarch's federal representative.³³³ The Governor General makes such appointments based on the advice of the federal Cabinet. However, while the Governor General holds the legal power to appoint Supreme Court justices, the choice of who will be appointed is actually done by the federal Prime Minister and his Cabinet. This is due to a constitutional convention³³⁴ in which the Governor General does not use any discretion in exercising his or her power of appointment. Instead, it is regular practice for the Governor General to simply act on whichever recommendation is put forth by the elected federal Cabinet. Moreover, the Prime Minister has the final say on which candidate will be recommended to the Governor General,³³⁵ which means that in practice, the opportunity to make recommendations combined with the power of final decision essentially give the Prime Minister the latitude to appoint the Supreme Court judges. There are currently eight members of the court, with one seat vacant. Since 2006, five of the eight judges have been appointed by the Conservative Prime Minister Stephen Harper.³³⁶

Compared with the Canadian process, the appointment of Constitutional judges in South Africa does not seem to be determined by ‘political patronage’. According to s174 to 178 of the Constitution, the power to appoint judges is bestowed on the

³³² Sarkin op cit (n321) 149

³³³ Section 4 [1] & {2} Supreme Court Act, R.S.C., 1985, c. S-26

³³⁴ A constitutional convention is an unwritten constitutional practice developed over time.

³³⁵ J Makarenco, ‘Supreme Court of Canada Appointment process’ *Judicial System & Legal Issues*, (February 1 2007) available at <http://www.mapleleafweb.com/features/supreme-court-canada-appointment-process>

³³⁶ See Supreme Court of Canada, available at <http://www.scc-csc.gc.ca/court-cour/ju/cju-jua-eng.asp>

President of the Judicial Service Commission, after consultation with the Chief Justice and the leaders of political parties represented in the National Assembly. The choice of candidates is made from a list drawn up by the Commission, following a call for nominations and the holding of public interviews.³³⁷

Since the political orientation of ‘individual judges has profound effect on their interpretation [of such issues] as which right to give superior weight to and how various rights ought to be balanced’,³³⁸ the appointment process of judges for the country’s highest Court becomes primordial in the separation of powers and the safeguard of judicial independence. In the current Canadian context, the majority of judges are aligned with the Conservative party in power. Moreover, the appointment process as described above and the current composition of the Court is a good indicator that the judges’ political allegiance was almost certainly taken into account for their nomination. It is therefore easy to grasp the reluctance of the Supreme Court to pronounce against legislation and its keenness to share the executive power’s position, even in a society where democracy is ‘well established’. As Sakin points out, the key issue concerning judicial activism in the political context ‘in relation to the role of the courts is the willingness of the judiciary to intervene, and the extent of such intervention, in terrain traditionally seen to be legislative.’³³⁹

When considering the imposition of mandatory minima in both jurisdictions, it becomes evident that the recent introduction of such penalties in Canada serves political goals. The latest introduction of mandatory minimum sentences in South Africa was in 1997, for the commission of serious offences. Since then, although the Constitutional Court has upheld the constitutional validity of minimum sentences, their application has constantly been challenged by courts. As we have seen in the case of rape, although the imposition of life imprisonment as a prescribed sentence was not found unconstitutional, this is now mainly a theoretical matter, as in practice the imposition of the prescribed minima is now the exception. In Canada, on the other hand, we have seen that since the Supreme Court’s intervention in the case of *Smith*,³⁴⁰ it has raised the burden very high for minimum sentences to meet the test of

³³⁷ See South African Government Information, Chapter 8 – Courts and administration of Justice, available at <http://www.info.gov.za/documents/constitution/1996/96cons8.htm>

³³⁸ Sakin op cit (n299) 135

³³⁹ Sakin op cit (n299) 138

³⁴⁰ *R v Smith* supra (n57)

being ‘grossly disproportionate’. Despite attempts to challenge their constitutional validity, the Supreme Court has constantly urged sentencing courts to apply the prescribed minima without consideration. The Court’s position is worrying given that the government has recently reintroduced mandatory minimum sentences, in a context that does not justify the need to be ‘tougher on crime’.

7.5 Is there a need for harsher sentences?

Criminological theorist David Garland³⁴¹ suggests that, over the past forty years, crime control strategies have changed in ‘developed countries’ such as the United States, the United Kingdom and, though perhaps in a gentler fashion, in Canada. Garland suggests that these countries have generally experienced a shift to two types of government action: enhanced control and expressive punishment.³⁴² In this context, society’s perception of crime and security, as expressed by general public opinion, becomes one of the main factors to be taken into account. As Garland points out, ‘the new penal ideal is that the public be protected and its sentiments expressed’.³⁴³ Garland continues his argument:

‘Where might one expect such ‘punitiveness’ from the elite to show most? If its members are looking for punitive segregation this attitude should be most salient with respect to repeat and violent offenders. These offenders are precisely the kind of individuals targeted by most of the three-strikes legislation and by many of Canada’s mandatory minimum sentence laws. People overestimate the amount of crime that involves violence, and they overestimate the likelihood that offenders will re-offend.’³⁴⁴

Canadian politicians see a need to adopt penal policies to tackle the crime level and keep the population safe even though there is actually no real need for such policies. Canadian society shares a misconception of the criminal justice, overestimating numbers of repeat and violent offenders.

In the early 80’s, Doob and Roberts,³⁴⁵ approached by officials of the Department of Justice Canada, conducted a series of interesting studies on public attitudes toward and beliefs about the criminal justice system. Their general findings were that if ‘it is well

³⁴¹ D Garland ‘The Culture of High Crime Societies: Some Preconditions of Recent “Law and Order” Policies’ (2000) 40 *British J. of Crim.* 347

³⁴² Ibid

³⁴³ Garland op cit (n341) 350

³⁴⁴ Ibid

³⁴⁵ AN Doob & JV Roberts ‘Social psychology, social attitudes, and attitudes toward sentencing’ (1984) 4 *Canadian Journal of Behavioural Science* 269

known that members of the Canadian public are not completely happy with their criminal justice system',³⁴⁶ the data are quite clear:

‘the Canadian public does have views about the sentences that are given and they are generally quite different from the best estimates available [...]. The public views crime as being more violent than it seems to be, sees the justice system as responding too leniently, and in some instances, more leniently than it in fact does, and feels changes should be made in this system.’³⁴⁷

As an example, Doob and Roberts have found that most crimes committed in Canada were not violent. In 1982, it was estimated that less than 10 per cent of crime involved violence, yet almost three-quarters of Canadians (73.9 per cent) who responded to the questions asked thought that at least 30 per cent of crime involved violence. It is the same story for the re-offender: statistics suggested that, at the very most, about 13 per cent of those released from prison on parole committed violent crimes after their release. However, almost two-thirds of respondents (62 per cent) estimated that the number was at least three times that (i.e. 40 per cent or more).³⁴⁸

To understand and interpret these views and beliefs about sentences, Doob and Roberts used a number of different methods. In order to find out how people responded to sentences as portrayed in the mass media, they compared subjects' reactions to different accounts of four separate cases. In three of the studies they compared one or more newspaper accounts to court-based documents, and in the fourth, comparisons were made only among different newspaper accounts of the same sentence.³⁴⁹ They found that, generally, the subjects who read the transcript were the most likely to think that the sentence was appropriate. In no cases were the readers of the newspaper accounts more likely to approve of the sentence than the readers of court-based documents. Furthermore, the last of their studies showed that, while readers of a newspaper felt that the sentence was too lenient, people evaluating exactly the same sentence for the same man for the same offence, when given the information available to the courts, saw this same sentence as too harsh.³⁵⁰

³⁴⁶ Doob & Roberts op cit (n345) 270

³⁴⁷ Doob & Roberts op cit (n345) 272

³⁴⁸ Doob & Roberts op cit (n345) 271

³⁴⁹ Doob & Roberts op cit (n345) 276

³⁵⁰ Ibid

These findings led the authors to formulate an interesting conclusion for the attention of policy makers. The adoption of harsher sentences is not the outcome actually desired by society and, therefore, there is no need to adopt a political agenda to address issues that are not really a concern:

‘[...] As we have noted, however, public attitudes to sentencing are shaped not by the reality which takes place in courts, but by the news media. It is not the sentence itself that people are reacting to (since it was constant across accounts) but the context in which the sentence is placed. **This suggests that policy makers should not interpret the public’s apparent desire for harsher penalties at face value; they should understand this widespread perception of leniency is founded upon incomplete and frequently inaccurate news accounts.**’³⁵¹ [emphasis added]

Even though these studies were conducted in the early 80’s, their conclusion remains relevant today. Indeed, it has been demonstrated over the years that the Canadian society does not generally adhere to a policy of ‘tough on crime’. In an article from 1997, Roberts³⁵² relies on the report of the Sentencing Commission³⁵³ to highlight that ‘there is considerable support for greater use of alternatives to imprisonment for non-violent offenders’. For example, when members of the public were asked to identify the single most effective way to control crime, fewer than one quarter chose making sentences harsher. Over half favoured reducing the level of unemployment or increasing the number of social programs.’³⁵⁴

It is interesting to note that, in comparison, ‘tough on crime’ policies could be more easily justified in South Africa which, recent statistics show, has an actual high level of violent crime. In the 2009-2010 calendar year, for example, the number of serious crimes committed in South Africa was estimated at 2 121 887. Over 30 per cent of these were contact crimes.³⁵⁵ More specifically, 30 per cent of all crimes were assault with grievous bodily harm, 29.2 per cent were common assault, 16.8 per cent were aggravated robbery and 10.1 per cent were sexual offences.³⁵⁶ But despite a level of violent crime that remains very high over the years, the last introduction of mandatory minima into legislation was in 1997. This difference between the recent policies

³⁵¹ Doob & Roberts op cit (n345) 278

³⁵² Roberts op cit (n43) 245

³⁵³ Canadian Sentencing Commission op cit (n44)

³⁵⁴ Roberts op cit (n43) 245

³⁵⁵ Such as murder, attempted murder, sexual offences, assault, robbery.

³⁵⁶ See South African Police Service, Department of Police, *Crime Statistics Overview RSA 2011/2012*, available at:

http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf.

chosen in the two countries reveals a political agenda that it is quite different for the two governments.

In reality, statutory mandatory minima are legislative tools promoted by the executive power to attract the public's favour and secure the population. However, there is no need for the Canadian government to rely on such a policy: first, harsher sentences for violent crimes or re-offenders are not justified in Canada. Second, as we will see in the final section, mandatory minima create a false sense of security, a sense that something effective is being done against the high crime rate.³⁵⁷ It is the misperception shared by society about the level of crime and the seriousness of crime that the Canadian government most needs to tackle. It should also seek to promote alternatives that have proven to be more effective in reducing crimes. Mandatory penalties are in fact ineffective as crime-control measures, especially when contrasted with other measures that use the same amount of public resources.³⁵⁸

7.6 Reducing disparity, improving efficiency and effectiveness

We have discussed the fact that, because both Canada and South Africa are jurisdictions where judges have had a great discretion in imposing sentences, mandatory penalties have been justified as a means to provide greater consistency in sentencing. However, limiting the discretion of judges for the benefit of statutory sentences was not the only option available to legislatures for addressing this issue. For example, Terblanche³⁵⁹ suggests that 'it is fairly widely accepted that there are four techniques that can be used to reduce disparity' and provide greater consistency in sentencing. Such alternatives can be found in the enactment of statutory sentencing principles, various systems of sentencing guidelines, judicial self-regulation and mandatory minimum sentencing schemes.³⁶⁰

In 1996, Canada opted for the enactment of statutory sentencing purposes and principles, but as we have seen earlier, these were general, and have in reality been

³⁵⁷ Terblanche op cit (n285) 5

³⁵⁸ Doob & Cesaroni op cit (n15) 299

³⁵⁹ A Ashworth 'Structuring sentencing discretion' and 'Four techniques for reducing sentence disparity' in A von Hirsch and A Ashworth op cit (n300) 216-217

³⁶⁰ Ibid

seen as little more than a codification of the *status quo* established by the courts. For its part, the South African Reform Commission³⁶¹ has proposed a system of sentencing guidelines that are intended to offer an alternative to prescribed minima. If the recommendations of this commission have not replaced the existing law, it is possible that they have at least precluded the enactment of further mandatory minimum sentences.

We can therefore hypothesise that the actual Canadian government would not have succeeded in the reintroduction of mandatory minima if the Canadian Sentencing Commission were still in place. Even if, despite any recommendations, the government had decided to enact statutory minima, the Commission could have suggested a holistic and effective interpretation of these dispositions for courts to apply. For example, based on the existing sentencing principles, the Commission could have set new guidelines for the application of mandatory penalties, which would have taken into account the judicial demand for sentencing discretion as well as the limited capacity of the penal system to carry out the sentences of the courts.³⁶² Unfortunately, as covered under the first section of this paper, Parliament decided to abolish the first and only Sentencing Commission that existed in Canada, with unfortunate consequences for the Canadian criminal justice system.

Looking over the imposition of the *Act 105 of 1997*, the South African Reform Commission examined judicial perceptions of mandatory minimums and proposed a Sentencing Framework Bill, which excluded the mandatory minimum sentencing regime and made recommendations regarding the basic sentencing principles. Although this Bill has not been adopted in its original form by the Parliament, it has led to intense lobbying efforts, and public debate surrounded mandatory provisions during the 2005 and 2007 pre-review periods.³⁶³ It was on the basis of these recommendations that the Governance and Administration Cabinet Committee introduced the Criminal Law (Sentencing) Amendment Bill,³⁶⁴ which attempted to address some of the unintended consequences of the Act.

³⁶¹ South Africa Law Commission op cit (n217)

³⁶² van Zyl Smit op cit (n173) 208

³⁶³ Roth op cit (n288) 163

³⁶⁴ Ministry of Justice and Constitutional Dev., Republic of S. Afr., *Media Statement: Minimum Sentencing Legislation* (March 13, 2007) available at: http://www.doj.gov.za/2004dojsite/m_statements/mst2007.htm.

In this report of 2000, the Reform Commission notably found that an ideal sentencing system:

‘should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the State to enforce in the long term.’³⁶⁵

The best way of achieving such an ideal system, the Law Commission concluded, is, first, to clearly state the basic sentencing principles in legislation and, secondly, to set up a sentencing council to provide sentencing guidelines.³⁶⁶ The Law Commission’s recommendations regarding the basic sentencing principles are contained in the Draft Sentencing Framework Bill. These principles are similar to the Canadian principles enacted in 1996.³⁶⁷ While the overall purpose in sentencing is seen as retribution,³⁶⁸ proportionality is described as the primary principle.³⁶⁹

The draft legislation also provides for an ‘optimal combination’ of aims towards which the sentence should strive: restoring the rights of victims, protecting society, and affording the offender the opportunity of a crime-free life.³⁷⁰ According to the Sentencing Framework Bill, these principles enunciated by the Law Commission would assist the Sentencing Council in its primary function of drawing up sentencing guidelines.³⁷¹ As an alternative to mandatory minimum sentences, the draft legislation suggests the introduction of guidelines which would ‘specif[y] sentencing options and their severity for a particular category [...] or sub-category of offence’.³⁷²

There is one criterion identified by the Law Commission in determining the extent of such guidelines that is particularly interesting. It requires that account must be taken of the capacity of the correctional system, both in respect to prisons and community

³⁶⁵ South Africa Law Commission op cit (n217) para1.43

³⁶⁶ South Africa Law Commission op cit (n217) para 1.44

³⁶⁷ Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

³⁶⁸ Retribution is stated as being *to punish* offenders for the offence of which they have been convicted - see Section 2 of The Report from the South Africa Law Commission op cit (n217)

³⁶⁹ Taking into account the seriousness of the crime, the degree of harmfulness and the degree of culpability of the offender

³⁷⁰ Section 3[3] of The Report from the South Africa Law Commission op cit (n217)

³⁷¹ 5[3] of The Report from the South Africa Law Commission op cit (n217)

³⁷² Section 5[1] of The Report from the South Africa Law Commission op cit (n217)

corrective facilities.³⁷³ This implies that sentencing guidelines must be sensitive to the resources available and/or allocated in the determination of the appropriate punishment. The costs-benefit consideration is particularly noteworthy when considering the imposition of mandatory minimum sentences and evokes questions about the Canadian government's policy.

It is true that when the government abolished the Sentencing Commission in the late 80's it was mainly for financial reasons. However, the same government has continued to enact mandatory minima, which are proven to be very costly and especially ineffective when compared with crime-control measures that use the same amount of public resources.³⁷⁴ Indeed, 'much of the academic literature shows that incapacitating individuals by increasing their sentence length has a slight effect on crime rates [and that] incapacitation is not a cost-effective way of combating crime'.³⁷⁵ Among others, US studies suggest that better use can be made of financial resources through education and social support. RAND researchers estimate that:

'The impact of a \$1 million investment in...cash and other incentives to disadvantaged students to graduate from high school would result in a reduction of 258 crimes per year, and parent training therapy for families with young "acting out" children 160 crimes per year, compared to a reduction of 60 crimes a year through building and operating prisons.'³⁷⁶

The figures suggest that appropriate social programmes may be at least twice as cost-effective as imprisonment in combating crime. Of course, such social programmes are not, strictly speaking, an alternative to imprisonment, as they are not always appropriate sentences for judges to apply. Such programs must first exist and count on sufficient resources to constitute a real alternative to punishment. In any case, the law should not restrict their imposition, i.e. it must be possible to punish an offender for the offence of which he or she is found guilty by a penalty other than imprisonment. Hence, social programmes would often not offer an alternative to judges for sentencing of most severe crimes. This is why such alternatives and any preventive or rehabilitating measures should be considered by Parliament as a meaningful part of sentencing policies.

³⁷³ Section 5[3](b) of The Report from the South Africa Law Commission op cit (n217)

³⁷⁴ Doob & Cesaroni op cit (n15) 299

³⁷⁵ O'Donovan & Redpath op cit (n164) 29

³⁷⁶ Greenwood, Model, Riddel & Chiese (1998) in O'Donovan & Redpath op cit (n164) 29

Doob and Cesaroni³⁷⁷ also denounce the high cost of punitive policies, including mandatory minima. Not only the 'human cost' is high, but also the 'social cost' associated to such policies, which makes it clear that these policies do not serve the best interests of the society. On the one hand, the great number of prisoners serving mandatory terms means an increase in prison populations and budgets.³⁷⁸ On the other hand, this represents a cost to society as an otherwise potentially productive member of the community becomes a burden rather than a contributor.³⁷⁹

Even beyond a cost effective consideration, the evidence of the past 50 years is clear: mandatory minimum sentences do not deter any more than less harsh, proportionate sentences.³⁸⁰

In previous sections of this paper, many examples were given of strong arguments put forward by renowned scholars in the field³⁸¹ against the introduction of mandatory minimum sentences into legislation. Furthermore, as we have seen in the case of both Canada and South Africa, the choice of statutory mandatory minima has not proven to meet the goals and purposes of sentencing policies. One of the major reasons for this failure is probably attributed to a certain dichotomy between pure theories (such as deterrence), on which Politicians rely to attract the public's favour, and the reality of offending behaviour. In fact, many studies highlight the fact that offenders are not generally aware of the sentences they may face when committing crimes,³⁸² and therefore the severity of the sentence that they may face has no impact. As justice Chaskalson points out in *S v Makwanyane*,³⁸³ 'the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished'.³⁸⁴

³⁷⁷ Doob & Cesaroni op cit (n15) 302

³⁷⁸ Federal spending on corrections in Canada has gone up from \$1.6 billion in 2005-06, when the Conservative party took power, to \$2.98 billion in 2010-11. That is an increase of 86 per cent. See T Milewski 'Texas conservatives reject Harper's crime plan', *CSC news* (17 October 2011) available at <http://www.cbc.ca/news/politics/story/2011/10/17/pol-vp-milewski-texas-crime.html>

³⁷⁹ Doob & Cesaroni op cit (n15) 303

³⁸⁰ Doob & Cesaroni op cit (n15) 291: various summaries exist. A useful one is M Tonry, 'Mandatory Penalties' (1992) 16 *Crime and Justice: A Review of Research* 243. See also DS Nagin, 'Criminal Deterrence Research at the Outset of the Twenty first Century' (1998) 23 *Crime and Justice: A Review of Research* 1

³⁸¹ Such as Dumont, Roberts, Roach, Doob, Cesaroni and Terblanche

³⁸² See, for example S Brochu, O Duranleau & N Bourdeau 'Impaired Driving: Analysis of Sherbrooke Statistics' (1990) 30 *Can. J. Crim.* 279 and R Hastings, 'A Comment on the Proposals for Firearms Controls' (1995) 37 *Can. J. Crim.* 220 at 226-7 in H Dumont op cit (n27) 9

³⁸³ *S v Makwanyane* supra (n186)

³⁸⁴ *S v Makwanyane* supra (n186) at 122

The sentence imposed on an offender for the commission of a criminal act is not an end in itself but the outcome of broader policies that should reflect society's choices. Arie Freiberg³⁸⁵ suggests that 'crime prevention strategies are more likely to be successful if they recognize and deal with the roles of emotions, symbols, irrationalism, expressionism, non-utilitarianism, faith, belief, and religion in the criminal justice system'. He adds that we 'must deal with the *affective* as well as the *effective*, with both the instrumental and sentimental aspects of penal policy', as '[s]uccessful penal reform must take account of the emotions people feel in the face of wrongdoing.'³⁸⁶ Citing Gaubatz,³⁸⁷ Freiberg suggests that the public's punitive attitude to crime may be based on four motivations: security, desert, compassion, and a desire for major social changes to improve society.³⁸⁸

If Freiberg is right, moving from mandatory minimum sentences to just sentences may require a careful crafting of crime policy. A policy that focuses on fair sentences, compassion and the understanding of victims as well as offenders, along with a policy that focuses on providing real rather than apparent security would appear to meet these requirements.³⁸⁹

³⁸⁵ A Freiberg 'Affective Versus Effective Justice: Instrumentalism and Emotionalism in Criminal Justice' (2001) 3 *Punishment & Society* 265-266

³⁸⁶ Freiberg op cit (n358) 275

³⁸⁷ KT Gaubatz 'Crime in the Public Mind' (1995) *University of Michigan Press* in A Freiberg op cit (n358) 271

³⁸⁸ Freiberg op cit (n358) 271

³⁸⁹ Doob & Cesaroni op cit (n15) 304

CHAPTER 8

CONCLUSION

The decision to incorporate statutory minimum penalties in a sentencing regime is, in theory, the legislator's. However, from the very first chapter of this paper, we have seen that the imposition of mandatory minima in Canada was guided by a strong right-wing political influence. In the face of conflicting recommendations of the Canadian Sentencing Commission, the government preferred to abolish the commission, and keep mandatory minima on the legislative agenda.

As explained in the first part of this paper, one of the problems with the Canadian regime is that the law does not provide a deviation clause that would allow a departure from the mandatory sentence when circumstances justify it. Rather, the law gives way to the parameters established by the *Canadian Charter of Rights and Freedoms*,³⁹⁰ where only a sentence which amounts to a 'cruel and unusual punishment'³⁹¹ under the circumstances can be set aside. Over the years, the Supreme Court of Canada has established a high burden for this test to be met, leaving a very slight chance for an accused to escape the statutory penalty.

While the current Canadian Parliament favours such a restrictive sentencing regime, mandatory minima receive little support among members of the judiciary and arouse the opposition of many academics. And with good reason: as we have seen in chapter 3, mandatory penalties in Canada infringe the principle of proportionality, affect the severity of sentences in general and create distortions to the efficiency of the judiciary system. However, this has not precluded the recent enactment of the *Safe Streets and Communities Act*,³⁹² which adopts the same legislative formula and prescribes the imposition of mandatory sentences, without an exemption clause or sunset clause. In contradiction to what the Canadian Sentencing Commission had recommended in 1988,³⁹³ presumptive guidelines were not adopted either.

³⁹⁰ The Constitution Act of 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, part 1

³⁹¹ *R v Smith* supra (n57)

³⁹² Safe and Streets Communities Act, S.C. 2012, c.1

³⁹³ Canadian Sentencing Commission op cit (n44)

The sentencing regime of South Africa was chosen as a comparative study to the Canadian regime, as it provides a recent legislative framework for the imposition of mandatory minima. Moreover, it incorporates an exemption clause, a solution that could be implemented in Canada. As presented under section 5.1, the sentencing guidelines in South Africa are provided from common law and the courts' interpretation. Although Canadian judges benefit from statutory sentencing principles,³⁹⁴ these are in fact the incorporation of common law principles into law and do not constitute a major difference in the sentencing processed of the two jurisdictions. Moreover, the fact that both jurisdictions evolved from a tradition of discretionary power has offered an interesting comparison as to the way that the courts have applied mandatory penalties. Likewise, as we have seen with the case study of *Makwanyane*,³⁹⁵ South Africa has benefited from the advent of a Constitution and a Bill of rights as a basis for challenging sentencing law, which was another notable similarity with Canada.

Unlike Canadian law, the South African legislation provides a clause designed to avoid the imposition of penalties that would be disproportionate to the crime or would amount to an injustice under the circumstances. However, we have observed that the 'substantial and compelling circumstances' clause³⁹⁶ has not turned out to be an effective 'middle ground' to balance the imposition of mandatory minima. Since the clause itself provides so little guidance, it is difficult for the Superior Court of Appeal to establish consistent parameters for its application. In the case of South Africa, the exemption clause has instead become a tool which the judiciary uses to manifest its disapproval of the affront to judicial discretion.

In both countries, the choice of mandatory minimum sentences was justified by the need to strengthen criminal law and to provide greater consistency in sentencing. On the first point, the last chapter of this paper has highlighted the fact that, in reality, the two societies have different legal cultures and do not share the same socio-political values. South Africa's stability is precarious and the country has a high crime rate, with a high rate of violent crimes. The Canadian reality is different: statistics analysed in section 7.5 demonstrate that there is no need to adopt penal policies in order to

³⁹⁴ Section 718 – 718.2 Criminal Code, R.S.C. 1985, c. C-46

³⁹⁵ *S v Makwanyane* supra (n186)

³⁹⁶ Section 51[3] Criminal Law Amendment Act 105 of 1997

tackle the crime level and keep the population safe. Having compared the appointment process for the highest Courts' judges in both jurisdictions, and understood that the political orientation of individual judges has a profound effect on their interpretation of various rights protected by law, we must conclude is that the reintroduction of mandatory minima in the Canadian 2012 Act cannot be justified by the need to impose a deterrent against crime. Rather, it indicates the interference of a right-wing political agenda in the judicial sphere.

Thus, the need for greater consistency remains. However, after a deep analysis of the purposes, consequences and impacts of mandatory minimum penalties throughout this paper, the conclusion is that the reintroduction of mandatory minima in the Canadian sentencing regime is not the most effective means to achieve this purpose. No matter how they are stipulated or the way in which they operate within the law,³⁹⁷ mandatory minimum sentences should be approached with caution. Canada should have opted for the implementation of a sentencing commission. Such an institution can suggest reforms which would enable a strong deterrent against crime, whilst ensuring that consistency is kept throughout the sentencing process and keeping the sentences in line with the sentencing principles. Taking into account the South African experience, as well as the theoretical and practical considerations discussed in this paper, it appears that the establishment of a sentencing commission would have been a much more considered choice by the Canadian government.

³⁹⁷ For example, with the stipulation of an exemption clause or a sunset clause.

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